Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

GEORGE MOLINA LOPEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

J.D. NIELSEN
Assistant Attorney General

ROBERT GORMAN
Assistant Attorney General
(Counsel of Record)
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686

CAPITAL CASE

QUESTION PRESENTED

Lopez was sentenced to death for brutally murdering his one-year-old son. Following his direct appeal, Lopez challenged his trial counsel's effectiveness in a petition for post-conviction relief, and the state court conducted a 4-day evidentiary hearing to address Lopez' claims. When Lopez filed a federal habeas petition, he raised claims of ineffective assistance of counsel, but he alleged specific claims of ineffectiveness vastly different from those raised in state court. The district court held that the aspects of the ineffective assistance claims that had not been pursued in state court were barred by procedural default and rejected the remainder of the claims after finding that the state courts' denial of Lopez' post-conviction claim was not an unreasonable application of *Strickland v. Washington*.

On appeal to the Ninth Circuit, Lopez' counsel acknowledged that Lopez had procedurally defaulted portions of his ineffective assistance of sentencing counsel claim. Nevertheless, the Ninth Circuit found that the district court erred by finding procedural default as to any aspect of the ineffective assistance claim.

1. Did the Ninth Circuit disregard this Court's long-standing jurisprudence relating to the doctrines of exhaustion and procedural default when it determined that Lopez had properly exhausted all of his ineffective assistance of sentencing counsel claims?

2. Did the Ninth Circuit err by rejecting the district court's finding that Lopez did not establish a claim for relief under *Strickland*, when Lopez failed to establish in state court how he was prejudiced by counsel's alleged deficient performance, notwithstanding the opportunity to develop his claim in a 4-day evidentiary hearing?

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OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Judges Hawkins, Thomas, and Clifton) held that Lopez' ineffective assistance of counsel at sentencing claim was exhausted in state court and should not have been dismissed on procedural grounds. *Lopez v. Schriro*, 491 F.3d 1029 (9th Cir. 2007) (Pet. App. B, at 1041.) The opinion reversed, in part, the decision of the United States District Court for the District of Arizona and remanded the case to the district court. *Lopez v. Schriro*, No. CV-97-2245-TUC-CKJ (Pet. App. B, at C.) The district court previously issued a procedural order on December 3, 1999. (Pet. App. D.)

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner's request for rehearing en banc on August 21, 2007. (Pet. App. A, at 1.) This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

George Lopez beat his 12-month-old son, Anthony, so severely that he fractured the child's skull in two places, using such force that the skull was driven into the brain. *State v. Lopez*, 174 Ariz. 131, 134-35, 143-44, 847 P.2d 1078, 1081-83, 1090-91 (1992). Lopez also fractured the infant's tenth and eleventh ribs near the spine (the autopsy showed three other partially healed fractured ribs that had been broken in the past). *Id.* The baby's pancreas had been torn in two. The beating also lacerated the baby's bowel; the membrane that holds the bowel in place; the spleen, and the adrenal gland. *Id.* When the child's mother, who had been out shopping, asked to take the baby to the hospital, Lopez refused to do so until several hours later when the baby had stopped breathing. *Id.* at 134-35, 847 P.2d at 1081-82.

A jury convicted Lopez of first-degree child abuse and first-degree murder, and Pima County Superior Court Judge Margaret Houghton sentenced him to death after finding that the murder was especially cruel, heinous, or depraved, and that the mitigation presented was not sufficiently substantial to warrant leniency. *Id.* at 136-37, 847 P.2d at 1083-84. The Arizona Supreme Court upheld Lopez' death sentence, noting that Lopez' primary mitigation of being a good parent, caring for children, and not acting inappropriately with them was rebutted by a prior conviction for child molestation. *Id.* at 143-45, 847 P.2d at 1090-92.

On July 6, 1994, Lopez filed a petition for post-conviction relief in the trial court. Among other arguments, he raised seven particular claims of ineffective assistance of counsel, asserting specifically: (1) Trial and appellate

counsel were ineffective for failing to challenge admission of prior bad acts; (2) Trial and appellate counsel were ineffective for failing to challenge a replica of Lopez' bedroom in the courtroom; (3) Trial counsel was ineffective for failing to object to the timing of the State's election to proceed on felony murder only; (4) Trial and appellate counsel were ineffective for failing to object to (or request) various jury instructions; (5) Trial and appellate counsel were ineffective in failing to challenge prosecutorial misconduct in opening and closing arguments; (6) Trial counsel was ineffective in opening statement and closing argument; and (7) Trial counsel was ineffective for not requesting the trial court to list all the mitigating circumstances offered and the reasons for rejecting them.

Lopez subsequently added a claim that trial counsel was ineffective for failing to call a psychiatrist or psychologist to explain Lopez' apparent lack of emotion and his inconsistent statements to the police as being the result of cultural and individual expressions of grief. Notably absent from Lopez' post-conviction petition were any claims of ineffective assistance of sentencing counsel.

The trial court conducted an extensive 4-day evidentiary hearing, during which the defense called a clinical psychologist, as well as trial and appellate experts, among other witnesses. At the conclusion of the hearing, Lopez filed a "Memorandum in Support of Post-Conviction Relief," reiterating the claims presented to the state court and adding claims that had been developed in the evidentiary hearing. The memorandum alleged ineffectiveness based on counsel's failure to object to prior bad act evidence of the victim's previous injuries, counsel's failure to "explain" Lopez' inconsistent statements to the police through expert testimony on the effects of grief, and

for having failed to object to the "circus-like" atmosphere at trial created by the presence of a replica of Lopez' bedroom. The defense presented two additional claims that it acknowledged had not been included in the post-conviction petition: (1) Counsel's failure to file a notice of change of judge, and (2) Counsel's ineffectiveness at sentencing "for all appearances" of having delegated the mitigation preparation to allegedly less-qualified co-counsel, and for having failed to give "direction" to Dr. Morris, the testifying expert at sentencing, to evaluate Lopez in a manner that would "help the case," especially by providing an opinion on Lopez' inconsistent statements to law enforcement. Lopez also faulted counsel for focusing at trial on lesser-included offenses to premeditated murder, only to be "surprised" when the State made a mid-trial election to proceed solely on felony murder. Lopez did not, however, provide any information regarding what relevant mitigation existed that counsel failed to investigate and/or present at sentencing.

After the trial court denied relief, Lopez filed a petition for review in the Arizona Supreme Court, and he included an issue entitled "Abandonment [sic] his client at the trial and/or sentencing stages." The entire argument relating to this issue encompassed one paragraph:

> Additionally, Mr. Bruner for all appearances turned over the mitigation preparation to Ms. Marshall, his junior counsel, who had previously done no serious trials including murder and/or death penalty trials. Mr. Bruner gave no direction to Dr. Morris [mental health expert] as to the evaluation, other than Mr. Bruner wanted to know about "overall personality dynamics,

> and things of this nature. Wasn't asking for anything specific to help the case, but was interested in learning more about the psychological makeup of Mr. Lopez." (Transcript of May 2, 1995, at 63.) Most importantly, Dr. Morris was not asked to evaluate or render an opinion as to the statements given by Mr. Lopez to law enforcement. (May 2, 1995, at 66.) Mr. Bruner believed that the death penalty would not be imposed in this case and prepared accordingly.[1]

After the Arizona Supreme Court and this Court summarily denied review of the post-conviction proceedings, Lopez filed a petition for writ of habeas corpus in federal district court alleging claims that included specific assertions of ineffective assistance of counsel: (A) Failure to adequately prepare and present evidence to rebut the (F)(6) aggravating factor; (B) Failure to investigate and present six types of mitigation evidence: (1) organic brain damage; (2) lack of intent to kill due to organic brain damage; (3) dysfunctional childhood; (4) childhood sexual assault; (5) good employment record, and (6) remorse; (C) Failure to object to presentation by the State of the victim's suffering caused by old injuries not attributable to Lopez; (D) Failure to adequately investigate cause of the victim's

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[1] At the state court evidentiary hearing, Attorney Bruner testified that he "would always have a client evaluated for any possible mitigation," and that he did not provide "directions" to Dr. Morris, because the psychologist "was someone who came very highly recommended as somebody who knew this area of the law, and . . . someone who knew psychology." Bruner did not expect the death penalty to be imposed, "because we felt we were very prepared to present good mitigation on behalf of George [Lopez]."

injuries; (E) Failure to conduct an adequate pre-trial investigation as to Lopez' diminished capacity; (F) Failure to move for preclusion of prior instances of abuse suffered by victim; (G) Failure to object to removal for cause of venireperson; (H) Failure to object to replica of bedroom in the courtroom; (I) Failure to object to irrelevant and prejudicial facts; (J) Cumulative effect of counsel's deficiencies at trial and sentencing; and (K) Failure of appellate counsel to raise numerous significant issues. The district court found that Claims 12(F), (H), and (K) were properly exhausted and appropriate for review on the merits. The district court found the remaining ineffective assistance claims procedurally barred. (Pet. App. D, at 46.)

The Ninth Circuit reversed the district court' decision and found that Lopez has exhausted every aspect of his ineffective assistance claim by making "general allegations of his counsel's lack of penalty phase preparation to the Arizona Supreme Court." (Pet. App. B, 491 F.3d at 1041.)

Lopez filed his federal habeas petition in March, 1997, after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Thus, this case is governed by the provisions of the Act.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case merits review by this Court because the Ninth Circuit disregarded this Court's long-standing jurisprudence relating to the doctrines of exhaustion and procedural default set out in *Picard v. Connor*, 404 U.S. 270 (1971), *Coleman v. Thompson*, 501 U.S. 722 (1991), *Gray v. Netherland*, 518 U.S. 152 (1996), *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), and *Baldwin v. Resse*, 541 U.S. 27 (2004). Contrary to the Ninth Circuit's assertion, a general claim of ineffective assistance of counsel does not exhaust every

conceivable form of ineffective assistance. By failing to assert in state court the specific allegations of ineffectiveness for which he now seeks relief, Lopez has procedurally defaulted those aspects of his claim.

To the extent Lopez is deemed to have exhausted his ineffective assistance of counsel claim in state court, the state courts' denial of relief in Lopez' post-conviction proceedings was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 688 (1984), because, notwithstanding a 4-day evidentiary hearing, Lopez never established in state court what mitigation evidence was available that would have changed the sentencing decision. Lopez has thus failed to satisfy the prejudice prong of the *Strickland* analysis and the state court's ruling denying his ineffective assistance of counsel claim should be upheld under any standard of review, much less the "doubly deferential" standard required under the AEDPA when review is conducted through the lens of federal habeas. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

The Ninth Circuit's order remanding the case to the district court will result in a waste of valuable resources because Lopez' ineffective assistance of counsel claim stands or falls based on the information that is already before the court. Lopez has not established a basis for further evidentiary development in federal court because he was given ample opportunity, including a lengthy evidentiary hearing, to develop his claim in state court. *See* 28 U.S.C. § 2254(e)(2) (federal court "shall not hold an evidentiary hearing" on a claim "if the applicant has failed to develop the factual basis of the claim in State court proceedings"). Thus, the Ninth Circuit's remand will result in a waste of valuable judicial resources, forcing the district court to reconsider a claim that Lopez failed to first establish as colorable under *Strickland* in state court.

I. The Ninth Circuit's Procedural Default Ruling Directly Conflicts With This Court's Long-Standing Jurisprudence That Requires Fair Presentation Of Claims In State Court Before They Can Provide A Basis For Relief On Federal Collateral Review.

Lopez' failure to present in state court allegations that counsel should have investigated organic brain damage, lack of intent to kill due to organic brain damage, dysfunctional childhood, childhood sexual assault, good employment record, or remorse, precludes review of those allegations on federal collateral review. In *Picard*, this Court held:

> Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with *the same claim* he urges upon the federal courts.

404 U.S. at 276 (emphasis added, internal citation omitted). In *Coleman*, this Court further pointed out that "a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." 501 U.S. at 731. *See also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (prisoner must do more than demonstrate that he made a "somewhat similar" state law claim).

In addition to Lopez' failure to present his current theory of ineffective assistance of sentencing counsel to the

trial court as part of his post-conviction proceedings, his failure to properly present his claim to the Arizona Supreme Court following proceedings in the trial court add another layer of procedural default. Lopez' petition for review in the Arizona Supreme Court did not reference any of the mitigation-related ineffective assistance of counsel concerns Lopez is pursuing in federal court. Thus, the Arizona Supreme Court was not provided the opportunity to consider those assertions in denying review, and Lopez failed to exhaust that aspect of his claim.

Under the Arizona Rules of Criminal Procedure, a petition for review must include both the issues decided by the trial court and the material facts needed to decide those issues. *See* Ariz.R.Crim.P. 32.9(c) and Ariz.R.Crim.P 32.9(c)(1)(ii)(iii). The general statements raised in Lopez' petition for review did not alert the Arizona Supreme Court to the factual predicate of the claim he is attempting to pursue in federal court. *See Baldwin*, 541 U.S. at 32 (claim not fairly presented when state court "must read beyond a petition or a brief" to find "the presence of a federal claim"); *see also Gray*, 518 U.S. at 163 (federal claims must be first raised in state court with specificity). In order to exhaust state remedies, Lopez was required to present his ineffective assistance claim to the Arizona Supreme Court. A.R.S. § 13-4031 (capital case post-conviction proceedings are appealed directly to the Arizona Supreme Court). His failure to do so with specificity is fatal to his current claim:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking

> one complete round of the State's established appellate review process.

O'Sullivan, 526 U.S. at 845.

Even assuming Lopez' petition for post-conviction relief can be construed to contain specific allegations of ineffective assistance of sentencing counsel, his less specific petition for review failed to put the Arizona Supreme Court on notice of the substance of his federal claims. The only claim Lopez "exhausted" by means of his petition for review was a general assertion that counsel turned over mitigation preparation to co-counsel and failed to give adequate direction to the mental health expert that testified on Lopez' behalf at trial and sentencing. Lopez did not exhaust any asserted prejudice under *Strickland*, *i.e.* how the sentencing result would have changed had counsel done more. Because Lopez did not raise the substance of his current ineffective assistance of sentencing counsel claim before the Arizona Supreme Court in a procedurally correct manner—something conceded by Lopez' federal habeas counsel—the Ninth Circuit's exhaustion ruling is directly contrary to *Picard*, *Coleman*, *Gray*, *O'Sullivan*, and *Baldwin*.

II. The Ninth Circuit's Ruling Directly Conflicts With Strickland v. Washington And Fails To Defer To A Reasoned State Court Determination.

To the extent Lopez' ineffective assistance of sentencing counsel claim is not procedurally defaulted, it is not colorable, and the state courts' rejection of Lopez' ineffective assistance claim on the merits was entirely consistent with *Strickland*. Under *Strickland*, a defendant must demonstrate that his sentence would have likely been

different had counsel done something more. 466 U.S. at 690 (in order to determine whether a petitioner was prejudiced by his counsel's deficient performance, he must first identify the particular acts or omissions that are alleged to have been the result of unreasonable professional judgment).

Notwithstanding an opportunity for evidentiary development in a lengthy hearing, Lopez never explained what type of evidence could have been provided that would have changed the outcome of his sentencing proceeding. Thus, he did not establish a colorable claim under *Strickland.*

In reversing the district court's ruling, the Ninth Circuit stated:

> We conclude that the district court erred by determining that Lopez's ineffective assistance of counsel claim was unexhausted. *Lopez did at least make the general allegations of his counsel's lack of penalty phase preparation to the Arizona Supreme Court* (including improper delegation to an inexperienced subordinate and failure to prepare mental health experts), and the state court record contains some evidence of a dysfunctional childhood and alcoholism. (Emphasis added.)

(Pet. App. B, *Lopez, 491 F.*3d at 1041. However, "general allegations" of ineffectiveness do not establish a colorable claim of ineffective assistance under *Strickland*, *see* 466 at 690. Accordingly, assuming *arguendo* Lopez exhausted a general claim in state court, the "general allegations" of his counsel's lack of penalty phase preparation do not establish a colorable claim, and the state courts' rejection of all of Lopez' assertions of ineffective assistance of counsel was not an

unreasonable application of federal law, as established by this Court.

III. A Remand Will Waste Resources and Unnecessarily Delay the Case.

The Ninth Circuit's decision sends the case back to the district court for consideration of the merits of a claim that is not colorable. Unless Lopez is granted an opportunity to develop new information that was not presented in state court, his ineffective assistance of counsel claim will remain in the same posture that it is currently in—it is not colorable under *Strickland* and does not entitle Lopez to relief.

In a footnote in the opinion, the Ninth Circuit stated:

> We note that Lopez apparently wishes to supplement the record in federal court with additional evidence of prejudice—information that could have been presented in the penalty phase mitigation proceeding, but was not presented due to defense counsel's allegedly deficient performance—that was not presented to the state courts. On remand, the district court will therefore need to determine whether Lopez, who received an evidentiary hearing in state court, is entitled to supplement the record or receive an additional evidentiary hearing in federal court. *See* 28 U.S.C. § 2254(e)(2); 28 U.S.C. foll. § 2254, R. 7 (setting forth the rule for expanding the record on federal habeas review).

Lopez, 491 F.3d at 1041, fn. 8. However, the footnote in fact demonstrates why remand is unwarranted. Under 28 U.S.C.

§ 2254(e)(2)(A)(ii), a habeas petitioner who has failed to develop the factual basis of a claim in State court proceedings is *not* entitled to an evidentiary hearing unless the petitioner establishes "a factual predicate that could not have been previously discovered through the exercise of due diligence." Here, Lopez has never asserted that there is a factual predicate that could not have been previously discovered. He was granted a 4-day evidentiary hearing in state court to do just that, yet he did not try to establish the existence of any specific items of mitigation the Ninth Circuit posits may be available to him.

Because there is no basis for granting an evidentiary hearing under § 2254(e)(2), the evidence will remain the same and Lopez is left with a *Strickland* claim that is not colorable.

Furthermore, the district court has already addressed and rejected Lopez' request to amend his habeas petition to raise four additional claims, including a claim (Claim 16) that his execution would violate the Eighth Amendment prohibition against cruel and unusual punishment because he suffers from brain damage that substantially diminished his culpability for the crime. (Pet. App. C, at 52.) Lopez submitted two affidavits from mental health professionals that opine that Lopez *possibly* suffers from brain damage, and that he was thus entitled to relief based on the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute the mentally retarded), and *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (holding that it is unconstitutional to execute a person who was a juvenile at the time of the capital offense).

After rejecting Lopez' *Atkins* and *Roper* arguments, the district court further ruled:

Moreover, the record simply does not support Petitioner's contention that he suffers from a legally significant brain impairment. The first of the affidavits Petitioner relies upon points to the opposite conclusion. Mitigation specialist O'Dowd states that:

> [Petitioner] had an excellent work history. He had been continuously employed throughout nearly all of his adult life. He was honorably discharged from both the U.S. Army and the National Guard. He also obtained specialty training and employment in heating/cooling and refrigeration. He worked for the City of Tucson from 1977 to 1987. At the time of the incident, he was employed as a safety technician/flag man at Cyprus Mine. He had been working everyday for at least a month, with shifts lasting up to 12 hours.

The second affidavit concludes only that Petitioner is a "candidate for organic brain damage" based on counsel's representations. The affiant, Dr. Thompson, never interviewed Petitioner nor reviewed anything about his medical, family, or educational background in making this assessment.

Further, to the extent Proposed Claim 16 alleges ineffective assistance of counsel, the state court found it precluded under Rule 32.2(a)(3). Therefore, it is procedurally

> defaulted and barred from review in this Court, absent a showing of legitimate cause for the failure to properly exhaust in state court and prejudice from the alleged constitutional violation, or that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *See Coleman*, 501 U.S. at 735 n.1. Despite having the opportunity, Petitioner has failed to allege either exception to overcome the default. Accordingly, the Court finds amendment to add Claim 16 would be futile *and is denied.*

(*Id.* at C 52–53)(citation omitted.)

The Ninth Circuit's footnote 8 ignores this ruling by the District Court and ignores the fact that there is no basis for permitting Lopez to supplement the record, given that he could have presented the information at issue at his evidentiary hearing in state court, but did not do so. Accordingly, sending the case back to the district court will be an exercise in futility, with the district court simply left to again assess the viability of a non-colorable *Strickland* claim.

Finally, Lopez was convicted and sentenced more than 17 years ago, and his case has been in federal court for over a decade. The Arizona courts gave Lopez ample opportunity to develop his claims, providing qualified counsel at every stage, including during post-conviction proceedings. Sending this case back to the district court under the circumstances outlined above will waste judicial and governmental resources, and will thwart the interests of justice, as well as the State's and crime victim's interest in finality.

The district court's finding of procedural default is clearly supported by the record, and the Ninth Circuit's decision not only ignores that record, but also a concession by Lopez' habeas counsel regarding significant portions of his ineffective assistance claim. This Court should intervene to prevent further delay unrelated to a viable claim for relief.

CONCLUSION

The Ninth Circuit misconstrued this Court's long-standing jurisprudence, as well Arizona law, when it found that Lopez' general allegations of his counsel's ineffectiveness at sentencing in a petition for review to the Arizona Supreme Court exhausted all conceivable assertions of ineffective assistance of sentencing counsel, including matters never raised or discussed in state court. Lopez in fact procedurally defaulted aspects of his ineffective assistance claims that were not presented in state court, and the remaining, properly exhausted portions of the claims do not create a colorable claim for relief under *Strickland*.

Remanding the case will be an exercise in futility, because Lopez cannot establish a basis under 28 U.S.C. § 2254(e) for further developing evidence that clearly could have been developed during a state court evidentiary hearing. On remand, the district court will thus be faced with the same non-colorable claim of ineffective assistance of counsel it previously addressed. Accordingly, this Court should accept certiorari review and reverse the decision of the Ninth Circuit.

Respectfully submitted

TERRY GODDARD
Attorney General

MARY O'GRADY

Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

J.D. NIELSEN
Assistant Attorney General
ROBERT GORMAN
Assistant Attorney General
(Counsel of Record)

Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686

EXHIBIT A

FILED
AUG 21 2007
CATHY A.
CATTERSON,
CLERK U.S.
COURT OF
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE LOPEZ,	)	No. 06-99000
	)	
Petitioner-Appellant,	)	D.C. No. CV-97-00224-CKJ
	)	District of Arizona,
v.	)	Tucson
	)	
DORA B. SCHRIRO, Arizona Department of Corrections Director; MEGAN SAVAGE, Warden,	)	ORDER
	)	
Respondents-Appellees.	)	

Before: HAWKINS, THOMAS and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

EXHIBIT B
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE LOPEZ,	No. 06-99000
	D.C. NO.
	CV-97-00224-CKJ
Petitioner-Appellant,	District of Arizona,
v.	Tucson
DORA B. SCHRIRO,*	
Arizona Department of	OPINION
Corrections Director;	
MEGAN SAVAGE,	
Warden,	
Respondent-Appellees)	

Appeal from the United States District Court
For the District of Arizona
Cindy K. Jorgensen, District Judge, Presiding

Argued and Submitted
March 6, 2007 - Tucson, Arizona

Filed June 20, 2007

Before: Michael Daly Hawkins, Sidney R. Thomas, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Hawkins;
Partial Concurrence and Partial Dissent by Judge Thomas

*Dora B. Schriro is substituted for her predecessor Terry Stewart, as Arizona Department of Corrections

Director, pursuant to Fed. R. App. P. 43 (c)(2).

COUNSEL

Cary Sandman, Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C., Tucson, Arizona, for the petitioner-appellant.

Robert J. Gorman, Arizona State Attorney General's Office, Tucson, Arizona for the respondents-appellees.

OPINION

HAWKINS, Circuit Judge:

Appellant George Lopez ("Lopez") was convicted in Arizona state court of child abuse and felony murder of his one-year-old son and sentenced to death. In this post-Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") habeas proceedings, he presents one certified issue: whether the state trial court denied Lopez his rights

under the Eighth Amendment by failing to consider mitigation evidence presented at trial. He also seeks to expand the certificate of appealability ("COA") to include four additional issues, including the Arizona Supreme Court's review of his death sentence and three ineffective

assistance of counsel claims. We affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

The relevant facts pertaining to the death of Lopez's son, Anthony, are set forth in the Arizona Supreme Court's opinion on direct review:

> Lopez met a woman in 1987 while he was coaching a coeducational softball team. He soon began having an affair with her and she became pregnant with his child in December 1987. Five months before the child was born, Lopez left his wife and moved in with the mother and her three-year-old son. The baby, named Anthony, was born in August 1988.
>
> One year and nine days later, August 26, 1989, Anthony's mother left the apartment at 10:00 a.m. to go shopping. She took her older child with her and left Anthony in Lopez' care. When she returned around noon, Lopez told her an accident had happened. He explained that while he was disposing of a soiled diaper in another room, Anthony had gotten off the bed a pulled a nightstand over on himself. Anthony's mother saw that he had a bruise on his forehead and another under his chin. She wanted to take Anthony to the hospital, but Lopez refused, saying Anthony would be all right.
>
> She held Anthony for a while and then laid him down. He soon wanted to be held again and she noticed that he was hot. She bathed him with alcohol

and held him again. She again told Lopez that they should take the child to the hospital, but Lopez again refused.

Anthony's mother had to do some laundry, so Lopez carried the laundry to the laundry room. When he returned, she left Anthony with him and went to put the laundry in the washing machines. When she returned to the apartment, she found Lopez performing cardiopulmonary resuscitation (CPR) on Anthony. They then took Anthony to the emergency room at University Medical Center (UMC). Emergency room personnel unsuccessfully attempted to resuscitate Anthony; he was declared dead at 3:36 p.m.

The police were summoned to the hospital and Officer Mardula spoke with the emergency room physician, examined the injuries to Anthony's body and then asked Lopez if he would speak with her and he agreed. Lopez had tears in his eyes, but appeared calm and rational. Officer Mardula read Lopez his *Miranda* rights and then asked him what had happened to Anthony. Lopez related the same facts that he had previously related to Anthony's mother. He stated that he had examined the baby and determined that he was "okay," but closely watched him. He stated that later when he was helping the mother with the laundry, he noticed that Anthony was not breathing. He performed CPR on the baby and then he and the mother took Anthony to the hospital. He became upset at this point, so Officer Mardula ended the interview.

Shortly after 5:00 that evening, Detectives Miller and Salgado approached Lopez at the hospital and asked him to accompany them to a room, adjacent to the emergency room, provided by the hospital for

paramedics and police officers to do paper work. Lopez appeared calm. Detective Miller explained to Lopez that they wanted to tape record their interview and then asked him how Anthony was injured. Lopez stated that he and Anthony's mother were home, heard a crash in the bedroom and when they went to investigate, found Anthony lying face down under the tipped-over nightstand. However, later in the interview, Lopez changed his story. He admitted that the mother was not at home. He stated that he had left Anthony on the bed while he disposed of a diaper. When he returned, he saw Anthony on the bed with one foot in the middle drawer of the nightstand reaching for a piggybank. He yelled at Anthony, startling him. Anthony then jerked backed and tipped the nightstand over on himself. He landed under the nightstand, face up.

Detective Salgado told Lopez he did not believe him and said the truth had to come out. Lopez denied any wrongdoing, and Detective Salgado said, "George, you're playing games with us now, "George." Lopez finally admitted that he had hit Anthony on the buttocks. Detective Salgado then read Lopez his *Miranda* rights. Lopez indicated that he understood his rights and would continue to answer questions. He never requested an attorney nor did he refuse to answer any of the detectives' questions, which he appeared to understand.

The detectives concluded the interview and left the room at approximately 7:00 p.m.

While Lopez was being interviewed by Detectives Miller and Salgado, Detective Millstone, a member of the homicide detail, arrived at the hospital. Detective Millstone interviewed Lopez and pointedly asked him if he had ever struck Anthony in anger. Lopez denied striking the child. Detective Millstone thought that the tape recorder was affecting Lopez'

candor, so he turned it off and asked Lopez what concerns he had about answering questions. Lopez told the detective he was afraid Anthony's mother might hear the tape. The detective told Lopez that he was not going to play the tape for her or relate the details of the interview with her.

Detective Millstone then turned on the tape recorder and Lopez began to tell his version of how Anthony received his injuries. He stated: "I got angry; I got angry at everything, everything that has been boiling over. I've been very angry these past couple of days and [the mother] knows that and everybody knew it." Lopez stated that earlier that day, he had given Anthony a bath and laid him down to put lotion on him and "he peed, so I smacked him." Then Lopez stated: "And I smacked him hard and he started crying and I got angry, so I got the diaper and went and threw it away and that's when I saw him." At this time, Lopez recounted yet another version of the cause of Anthony's injuries. This time, after Anthony climbed on the nightstand and Lopez

yelled at him, Anthony grabbed the lamp as he fell beneath the nightstand. Lopez jumped toward the nightstand to prevent it from falling on Anthony, but instead he fell on top of the nightstand. Then the radio, which had been on the nightstand, fell and hit Anthony in the face. Detective Millstone concluded the interview at 7:22 p.m.

Detective Millstone then spoke with the treating physician and the medical examiner who told him that the injuries Anthony suffered were not consistent with Lopez' stories. A telephonic search warrant was obtained for Lopez' apartment. Lopez went with the police officers to the apartment and demonstrated how Anthony was injured. After the demonstration, Lopez was arrested.

The next day, an autopsy was performed on Anthony. The doctor found numerous bruises on Anthony's face, chest, back and buttocks. Some bruises had occurred within 24 hours, but many were older. Anthony's skull was fractured in two places, one of which had been caused with such force that part of the fractured skull had been driven into the brain. Anthony also had an extensive hemorrhage in the membrane separating the brain from the skull.

The internal examination revealed that Anthony's 10th and 11th ribs were fractured near his spine. These injuries corresponded to the bruises on Anthony's back. These fractures were had been caused within 24 hours of death. The doctor also found that Anthony's 7th, 8th

> and 10th ribs had been broken in the past and were healing when Anthony died. Anthony's pancreas was torn in two, his bowel and the membrane holding it in place were lacerated, and his spleen and adrenal gland had bled. The abdominal injuries had caused peritonitis. All of these injuries had been caused within 24 hours of death. The doctor determined that Anthony had died of blunt- force trauma to the head, chest and abdomen.

State v. Lopez, 847 P.2d 1078, 1081-83 (Ariz. 1992).

Lopez was indicted on one count of first-degree murder and one count of child abuse, and a jury convicted him on both counts. At an aggravation/mitigation hearing conducted prior to sentencing, Lopez put on numerous friends and family members as witnesses, who testified that Lopez was a non-violent person who liked to help people and that he had never acted inappropriately toward their children or his own. Various community members testified concerning Lopez's service in community organizations and the military, and about his positive employment history. A prison chaplain testified that Lopez was a cooperative and well-behaved inmate who regu-

larly attended Bible study classes and helped other inmates, and could carry out his mission of helping others if given a life sentence. Another prison official testified that Lopez was cooperative and had no disciplinary reports.

The prosecution presented testimony from an expert witness, Dr. Hobeich, a pediatrician with expertise in child abuse. Dr. Hobeich testified about the pain Anthony likely

experienced from his injuries, which he compared to "surgery without anaesthesia." He also described the symptoms of a child with Anthony's injuries, including being "hot to the touch" and "lethargic" and lacking the power or energy for a full cry, making more of a "cat cry" instead to communicate pain before eventually losing consciousness. Dr. Hobeich testified that Anthony was probably conscious and in pain for at least an hour, and that there was at least a possibility he could have survived his injuries if he had received treatment for them sooner. In closing arguments to the court, defense counsel relied on the mitigating evidence presented at the aggravation/mitigation hearing, but also made a substantial argument that the record did not demonstrate that Lopez ever intended to kill his son. The trial court found the state had proved two aggravating factors: that the defendant committed the offense in an especially heinous, cruel and depraved manner, and that the defendant was an adult and the victim was under the age of fifteen. The court found no statutory mitigating circumstances and indicated it had considered "all evidence presented by the defendant by way of mitigation."

The court concluded:

> The victim, a child of 12 month and 9 days of age, was at the mercy of the defendant with no ability to protect or defend himself. His suffering was apparent or foreseeable, but the defendant's selfish concern to shield himself from the consequences of his own actions caused him to deny the child any hope for life or the surcease of his pain through medical treat-

> ment. The Court finds that the cruelty and depravity of defendant's acts towards the innocent, helpless baby in his care far outweigh any evidence which might call for leniency.

The court then imposed the death penalty.

On direct appeal, a majority of the Arizona Supreme Court affirmed the conviction and sentence. *Lopez*, 847 P.2d at 1092. The majority indicated it was undertaking an independent review of the record to determine whether the death sentence was appropriate, and concluded that the evidence supported the finding on the two aggravating factors, and that the trial court could properly find that the record refuted the proffered mitigation evidence. *Id.* at 1090-92. Two justices dissented from the imposition of the death sentence, faulting the trial court for failure to comply with an Arizona statute requiring specific findings regarding the mitigating circumstances. (citing Ariz. Rev. Stat. § 13-703 (D)).

Lopez then sought state collateral relief, raising, among other things, a number of claims regarding ineffective assistance of trial and appellate counsel. Following an evidentiary hearing, the superior court denied Lopez's petition in its entirety. Lopez then filed a petition for review with the Arizona Supreme Court, again raising a number of ineffective assistance of counsel claims, including allegations that his counsel had "abandoned" him at the sentencing stage. The Arizona Supreme Court issued a postcard denial of this

petition. Lopez's petition for writ of certiorari to the United States Supreme Court was also denied.

Lopez then initiated this habeas action in federal district court. The district court found several claims to be unexhausted and dismissed those claims. Lopez subsequently returned to the state superior court, which denied some claims on procedural grounds and other on their merits. Petitions to the Arizona Supreme Court and United States Supreme Court

were also denied. Lopez then returned to the district court and moved to amend his petition to add these now-exhausted claims, but the district court denied the motion, holding that amendment would be futile and would cause undue delay and prejudice to the government. The district court denied relief on the remaining claims on their merits. The district court then *sua sponte* issued a COA on the issue of whether Lopez's constitutional rights were violated by the sentencing court's failure to consider and give effect to mitigation evidence presented at trial.1

STANDARD OF REVIEW

The district court's denial of habeas relief is reviewed *de novo*. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005), *cert. denied sub nom., Barker v. Spalding*, 126 S. Ct. 2041 (2006).

Lopez's appeal is governed by AEDPA. Under AEDPA, this court may not grant a writ of habeas

corpus on behalf of a person in state custody unless the state's adjudication of his claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d).

In assessing whether a state court's application of law or determination of fact is "unreasonable," the court cannot simply consider whether it would have reached a different out-

1 The court also issued a COA as to whether Lopez's claim that his rights were violated when the sentencing court improperly limited the scope of mitigation evidence was procedurally barred. However, Lopez concedes that this second issue is either moot or immaterial since the district court reached the claim on its merits.

come on the same record. Rice v. Collins, 126 S.Ct. 969, 976 (2006) (stating that "[r]easonable minds reviewing the record might disagree about" the ultimate issue is insufficient for habeas relief). Rather, "[t]he 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citing Williams v. Taylor, 529 U.S. 362, 410, 412 (2000)). It requires the decision to be "objectively unreasonable."

Id. (citing *Williams*, 529 U.S. at 410).

DISCUSSION

I. The Sentencing Court's Alleged Failure to Consider and Give Effect to Mitigating Evidence Presented at Trial.

[1] Lopez's one certified claim alleges that the state sentencing court failed to consider and give effect to all the mitigating evidence he presented. Lopez relies principally on Eddings v. Oklahoma, 455 U.S. 104 (1982), which held that a sentencing court could not refuse to consider a petitioner's unhappy upbringing and emotional disturbance as mitigating evidence.

[2] Here, however, the sentencing court did not prevent Lopez from presenting any evidence in mitigation, nor did it affirmatively indicate that there was any evidence it would not consider. Indeed, the sentencing court expressly stated that it "ha[d] considered all evidence presented by the defendant by way of mitigation." Lopez acknowledges this statement, and also admits that a court is usually deemed to have considered all mitigating evidence where the court so states. *See Clark v. Ricketts*, 958 F.2d 851, 859 (9th Cir. 1192); *Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did.").

Lopez argues that the court's statement is insufficient in this case because the judge made contradictory statements

earlier during the aggravation/mitigation hearing which suggested she was excluding a "whole category of mitigation evidence" – evidence which was offered at trial but not reintroduced at the sentencing hearing. The genesis of Lopez's argument is the court's statement early in the proceedings that "[a]s to [the murder court] the Court is considering only those factors presented at the aggravation/mitigation hearing." However, when the statement is place in context, it does not carry the meaning Lopez would assign to it.

[3] At the beginning of the sentencing hearing, the court ruled on various motions by Lopez to exclude statements by himself and the victim's family which appeared in the presentence report. The court granted Lopez's motion to strike these statements, "consistent with the Court's decision to rely upon evidence *received in trial and the presentence hearing*." (emphasis added). Shortly thereafter, the court stated:

> For the record, the Court has read the presentence report, the letters and other documents submitted by the defendant in the time period since the verdict was entered – large since the presentence was prepared and filed, as well as this Court's *having heard the trial* and the aggravation/mitigation hearing on May the 10th, 1990.

(emphasis added). Having reference the presentence report, the Court then went on to clarify, consistent with its earlier

ruling:

> As to [the murder count], the Court is considering only those factors presented at the aggravation/mitigation hearing.
>
> As to [the child abuse court], the Court is considering the information set forth in the presentenced report.

> The Court does not rely upon any information set forth in the defendant's or the victim's statements in the presentence report.

When the court's statement is put in this context, it is apparent that the judge was not announcing she was confining her consideration to only evidence that was introduced at the aggravation/mitigation hearing, but rather attempting to restate her ruling that she would not consider the statements in the presentence report.

Lopez argues that the statement is at least ambiguous and that we should not speculate as to whether all the mitigating factors were actually considered. As discussed above, however, the sentencing court's statement is susceptible of Lopez's interpretation only if read in isolation, and is certainly not enough to overcome to presumption that the state court knew and followed the law. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Under AEDPA, we must do more than find the statement ambiguous - we would have to conclude that the Arizona Supreme Court was

objectively unreasonable in concluding the sentencing court did, in fact, review all the proffered mitigating evidence. *See Lockyer*, 538 U.S. at 75. Relying on the sentencing court's express statements that is had read the presentence reports, heard the trial and the aggravation/mitigation hearing, and considered all evidence presented by Lopez, the Arizona Supreme Court concluded that "[t]he record before us clearly indicates that the trial judge considered all the mitigating factors presented by Lopez." *Lopez*, 847 P.2d at 1091. This is not an *unreasonable* determination of the facts in light of the record before it. *See Parker*, 498 U.S. at 314-15 (assuming trial judge considered all mitigating evidence before passing sentence because he said he did and state law required him to).2

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2 This court reviews the Arizona Supreme Court's decision because it is the last reasoned decision on the issue. *Barker*, 423 F.3d at 1091-92. The determination of what the trial judge found is an issue of historical fact. *Parker*, 498 U.S. at 320.

Moreover, the sentencing judge clearly made findings that were based on trial evidence, thus negating the argument that the court only considered evidence from the aggravation/mitigation proceedings. For example, the court found that Lopez "willfully and intentionally" abused the child, that the baby was entrusted to Lopez's care, and that Lopez denied the child medical treatment to protect himself, although the actual circumstances of the crime and aftermath were not discussed by witnesses at the penalty phase hearing. In

fact, it appears that at one point Lopez similarly viewed the record, as in one of his state post-conviction petitions, he asserted: "At sentencing, the court imposed the death penalty; it appears this court reached its decision to impose death *in part from testimony at the guilt phase of the trial*." (emphasis added).

Lopez contends that the trial court must have failed to consider the trial court record because it did not find the lack of intent to kill as a mitigating factor. Of course, the trial court did not specifically discuss *any* of the mitigating evidence that Lopez presented, so a failure to discuss this factor does not necessarily indicate it was considered. In addition, on the date the court pronounced sentence, Lopez's counsel made an argument before the court that was primarily based on the lack of intent to kill.3

[4] In light of the foregoing, we agree with the district court that the Arizona Supreme Court was not objectively unreasonable in determining that the sentencing court had considered

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3 The sentence court found that Lopez had "willfully and intentionally physically abused the child entrusted to his care and caused his death." Lopez argues that his statement simply underscores that the court did not find the "intent to kill," just intent to abuse, but the state argues that the "willfully and intentionally" language also modifies "caused his death." Because either interpretation is plausible, the statement is at best ambiguous, and does not cut strongly one way or the other.

all of Lopez's proffered mitigating evidence, including the evidence presented at trial.4

II. Meaningful Appellate Review

[5] After the district court *sua sponte* issued the COA as to Issue I, Lopez asked this court to expand the COA. A motions panel denied this request, but indicated Lopez could re-raise these issues in this opening brief, which he has done. We construe this additional briefing as a further motion to expand the COA. *See* Circuit Rule 22-1(e). To receive a COA, Lopez must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[6] Lopez argues that the Arizona Supreme Court failed to provide meaningful independent review his sentence. This issue is not, as Lopez argues, somehow encompassed by the certified issue discussed above. To the contrary, the district court expressly limited is COA to alleged errors committed by "the sentencing court[]." Rather Lopez raises an entirely independent constitutional claim5 regarding the Arizona Supreme Court's review process, alleging that the Court mistakenly determined that the trial court found "no mitigation," when the trial court in fact weighed the mitigating factors against the aggravators. This claim is not only unexhausted,

4 Because we agree with this conclusion, we need not address the district court's alternate holding that even if the trial court had erred and failed to consider all the mitigating evidence presented at trial and sentencing, any such error was cured by the Arizona Supreme Court's independent review of the record.

5 The Eighth and Fourteenth Amendments prohibit the government from imposing the death penalty in the arbitrary or irrational fashion, and the Supreme Court has held that "meaningful appellate review" is necessary to ensure that the death penalty is not imposed in such a manner. Pulley v. Harris, 465 U.S. 37-45 (1984) (citing Gregg v. Georgia, 428 U.S. 153, 198, 204-06 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *Parker*, 498 U.S. at 321.

it is actually raised for the first time on this appeal.6 We therefore deny a COA on this issue.

[7] Lopez also attempts to sweep this claim within one he did raise below in the district court: that the state trial court made constitutionally inadequate findings. Lopez argued below that the trial court's failure to list the factors it considered and its conclusions surrounding them violated due process and its conclusions surrounding them violated due process and made it impossible for the Arizona Supreme Court to perform its independent duty of review. However, Lopez does not point to any "clearly established" Supreme Court precedent setting forth the record the sentencing court must make in order to permit sufficient appellate review. See 28 U.S.C. § 2254(d)(1). The district court thus denied Lopez's claim, noting that there was no clearly

established Supreme Court law or constitutional requirement "that a particular sentencing record be produced by the trial court." We agree, and have expressly held that "[w]hile it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence . . . due process does not require that the sentencer exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant." *Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (citing *Gardner v. Florida*, 430 U.S. 349, 361 (1977) (plurality opinion)); *see also Williams v. Stewart*, 411 F.3d 1030, 1057 (9th Cir. 2006) ("[T]he trial court is not required to 'itemized and discussed every piece of evidence offered in mitigation' . . . [so long as it makes] clear to the reviewing court that the sentencing court considered all relevant mitigating evidence that was offered."); Clark, 958 F.2d at 858 n.5 (not-

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6 The only error in the Arizona Supreme Court's review that Lopez alleged in this federal habeas petition was the Court's failure to conduct proportionality review of his death sentence. In addition, in Lopez's state and federal filings, he consistently asserted – contrary to his assertion now-that the trial court *had* made an (erroneous) findings of "no mitigation."

ing that after *Parker*, it is clear the "due process clause does not require the sentencing court to conduct an on-record discussion of each mitigating factor"). Because

the district court's determination on the merits of this claim is not debatable among jurists of reason, we deny the COA on this uncertified claim.

III. Exhaustion of Ineffective Assistance of Counsel Claim Regarding Failure to Investigate and Present Reasonably Available Mitigating Evidence

In his federal habeas petition, Lopez asserts that this counsel rendered ineffective assistance by failing to investigate and present all relevant mitigating evidence at sentencing, including evidence of organic brain damage, dysfunctional childhood, childhood sexual assault, a good employment record and remorse. The district court did not reach the merits of this claim, however, because it found this issue had not been exhausted to the Arizona Supreme Court.

Because the district court dismissed Lopez's claim on the procedural ground, we apply *Slack* to both the procedural ground and the underlying constitutional claim to determine if they are debatable among jurists of reason. *Valerio v. Crawford*, 306 F.3d 742, 774 (9th Cir. 2002). With respect to the substantive prong, however, we take only a "quick look" to determine whether the petition facially alleges the denial of a constitutional right. *Id.* at 775 (internal quotation marks omitted).

[8] In order to fulfill exhaustion requirement, a petitioner must present to the state courts the "substantial equivalent" of the claim presented in federal court. *Picard v. Conner*, 404 U.S. 270, 278 (1971). "[S]tate courts have been given a sufficient opportunity to hear an issue when the petitioner has presented the state court with the issue's factual and legal basis."

Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999). However, a petitioner may provide further facts to sup-

Port a claim in federal court, so long as those facts do not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Lopez did seek post-conviction relief in Arizona Superior Court pursuant to Arizona Rule of Criminal Procedure 32. He alleged, among other things, that he had received ineffective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 688 (1984). Although the state correctly notes that Lopez's initial bifurcated petition did not specifically challenge counsel's lack of preparation for the penalty phase, the issue was eventually briefed in memoranda to the state trial court, and that court did issue a ruling on the merits.

The state court also permitted an evidentiary hearing on Lopez's claim. At the evidentiary hearing, Lopez presented evidence about his trial counsel's failure to investigate and present mitigation for the capital sentencing, as well as expert testimony about the allegedly competent defense attorney's duties of investigation and presentation of mitigating evidence. An expert testified that competent defense counsel had a duty to investigate Lopez's background and social history, and as a result of counsel's failure to do so, the sentencing judge did not discover that Lopez grew up in a dysfunctional household with alcoholic parents and also began drinking at an early age. The expert also testified that trial defense counsel failed to provide the

examining psychologist with any evidence of family, medical and social history.

The state court rejected this claim on the merits, concluding that evidence of Lopez's alcohol abuse was not sufficiently substantial to call for leniency. Lopez then appealed the denial to the Arizona Supreme Court. In his statement of issues, Lopez indicated he was prejudiced by his trial counsel's "abandonment [of] his client at the trial and/or sentencing." He identified *Strickland* as the governing federal constitu

tional standard. His petition for review elaborated on the claim as follows:

> Mr. Bruner [trial counsel] for all appearances turned over the mitigation preparation to Ms. Marshall, his junior counsel, who had previously done no serious trials including murder and/or death penalty trials. Mr. Bruner gave no direction to Dr. Morris [evaluating psychiatrist] s to the evaluation, other than Mr. Bruner wanted to know about "overall personality dynamics, and things of his nature. Wasn't asking for anything specific to help the case, but was interested in leafning more about eh psychological makeup of Mr. Lopez." Most importantly, Dr. Morris was not asked to evaluate or render an opinion as to the statements give by Mr. Lopez to law enforcement. Mr. Bruner believed that the death penalty would not be imposed in this case and prepared accordingly.

The Arizona Supreme Court denied Lopez's petition.

[9] We conclude that the district court erred by determining that Lopez's ineffective assistance of counsel claim for failure to investigate and present mitigating evidence was unexhausted. Lopez did at least make the general allegations of his counsel's lack of penalty phase preparation to the Arizona Supreme Court (including improper delegation to an inexperienced subordinate and failure to prepare mental health experts), and the state court record contains some evidence of a dysfunctional childhood and alcololism.7 A. "quick look" at

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7 We recognized that Lopez's habeas counsel conceded to the federal district court that some sub-parts of this claim were not exhausted by post-conviction counsel. However, this court can independently review the state court record to determine whether the issue has actually been exhausted. See Aiken v. Spalding, 841 F.2d 881, 883 (9th Cir. 1988) (per curiam).

the merits of his federal claim also reveals that Lopez has sufficiently alleged the deprivation of a constitutional right. *Valerio*, 306 F.3d at 775. We therefore grant the COA on Lopez's penalty phase ineffective assistance claim for failure to investigate and present mitigating evidence and remand to the district court for further proceedings.8

IV. Procedural Bar Regarding Defense Counsel's Failure to Rebut Testimony by Dr. Hobeich

In this federal petition, Lopez claims that his trial counsel was also ineffective for failing to rebut the testimony of the state's aggravation witness, Dr. Hobeich. who presented testimony about the pain Lopez's son likely suffered before death. The district court first found this claim to be unexhausted, and then, procedurally barred on an adequate and independent state law ground. As with the previous claim, we analyze whether to grant a COA by applying the *Slack* standard to the district court's procedural ruling and to the underlying constitutional claim. *Valerio*, 306 F.3d at 774.

In December 2000, Arizona amended its Rule 32 state post-conviction procedures, adding a new avenue of relief from the death sentence if "[t]he defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish . . . that the court would not have imposed the death penalty." Ariz.R.Crim.P. 32.1(h). After the district court dismissed Lopez's claim as unexhausted, in

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8 We note that Lopez apparently wishes to supplement the record in federal court with additional evidence of prejudice – information that could have been presented in the penalty phase mitigation proceedings, but was not presented due to defense counsel's allegedly deficient performance – that was not presented to the state courts. On remand, the district court will therefore need to determine whether Lopez, who received an evidentiary hearing in state court, is entitled to supplement the record or receive an additional evidentiary hearing in federal court. See 28 U.S.C. §

2254(e)(2); 28 U.S.C. foll. § 2254, R.7 (setting forth the rule for expanding the record on federal habeas review).

1999 Lopez returned to state court, seeking relief under this provision by arguing that his counsel's deficient performance deprived the state court of evidence that would have changed his sentence. The state trial court, however, held the claim precluded under Rule 32.2(a)(3),9 concluding the claim could have been presented in Lopez's first post-conviction proceedings. *See* Ariz. R. Crim.P. 32.2(a)(3) (providing for dismissal of a claim that "has been waived at trial, on appeal, or in any previous collateral proceedings."). Lopez sought review with the Arizona Supreme Court, but it refused to consider the claim.

Lopez then returned to the district court and sought to amend his habeas petition to add this claim. The district court rejected the proposed amendment, citing the state court's procedural default of the claim. Lopez, however, argues that the state court's reliance on Rule 32.2(a)(3) was in error, because prohibits the state court from applying Rule 32.2(a)(3) to 32.1(h) claims. Rule 32.2(b) provides:

Rule 32.29a) [preclusion from relief] shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under [these rules] is to be raised in successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition

or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating whey the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

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9 The state court actually cited "32.1(a)(3)," which does not exist; the citation is apparently a typographical error, as Lopez acknowledges.

The district court reasoned that, although the state court did not cite Rule 32.2(b) or 32.1(h) in its ruling, the court's dismissal of the claim under Rule 32.2(a)(3) meant it "must have necessarily concluded that the claim failed to constitute an exception to Rule 32.2(a) preclusion as set forth in Rule 32.2(b)."10 In other words, in the district court's view, the state court had interpreted Rule 32 to require dismissal under 32.2(a) if the showing required under 32.2(b) was not satisfied.

[10] The district court's interpretation is entirely plausible. Although the first sentence of Rule 32.2(b) states that "Rule 32.2(a) shall not apply" to claims for relief based on certain subsections, including 32.1(h), the rule goes on to state various requirements and concludes that, "[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner," the claim is to be dismissed. As the district court noted, state courts are presumed to know the correctly apply state law. *See*

Walton v. Arizona, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *Beaty v. Stewart*, 303 F.3d 975, 986 (9th Cir. 2002). Moreover, Lopez specifically argued to the Arizona Supreme Court that the trial court had erred in finding the claim precluded, and the Court did not reverse the ruling.

[11] We grant the COA because the district court's procedural determination is debatable among reasonable jurists and Lopez has facially alleged a deprivation of a constitutional right, but we nonetheless affirm the district court's ruling.

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10 Lopez now argues that the district court erred by relying on a theoretical but unstated procedural bar; however, this is not quite what the district court did. Rather, the district court concluded that the state court must have found the Rule 32.2(b) exception did not apply to save Lopez's new petition, and that this was why the state court had dismissed under the ordinarily applicable Rule 32.2(a).

This court, when sitting as a habeas court, generally respects state court determination of state law. *See Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law). We have previously recognized an exception to this deference if the state court's interpretation is "clearly untenable and

amounts to a subterfuge to avoid federal review of a deprivation by the state of rights guaranteed by the Constitution." *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir. 1982). As discussed above, there are ways to construe the state court's ruling that would not make it "clearly untenable," and we are therefore bound by the state court's interpretation and application of its own procedural rules.11 The district court properly declined to permit Lopez to amend his petition in light of the state court's ruling.

V. Defense Counsel's Failure to Object to Evidence of Prior Injuries

During the guilt phase of Lopez's trial, the medical examiner, Dr. Henry, testified that Anthony suffered from several healing injuries, including rib fractures and bruises about his face and torso. Lopez argues that his counsel should have moved to exclude this evidence under Arizona Rule of Evidence 404(b), as evidence of other crimes, wrongs, or acts not admissible to prove the character of a person, and asks this court to grant a COA on this issue. He argues the evidence was not admissible under any of the exceptions, such as to prove absence to mistake or accident, because the state had not proven by clear and convincing evidence that Lopez caused the other injuries. *See State v. Nordstrom*, 25 P.3d 717,

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11 Lopez does not otherwise challenge the application of Rule 32.2(a) as an "independent and adequate" state law ground, *see Stewart v. Smith*, 536 U.S. 856, 861 (2002)

, and *Ortiz v. Stewart*, 149 f/3d 923, 931-32 (9th Cir. 1998), nor does he attempt to demonstrate cause and prejudice for the procedural default.

736 (Ariz. 2001). Lopez contends that had this evidence been excluded, there is a reasonable probability that the jury would have convicted him of a lesser-included offense – reckless child abuse-which is a non-capital felony.

This claim was raised in state post-conviction proceedings and denied on the merits. The state court concluded that defense counsel's decision not to object to the admission of the evidence did not fall below an objective standard of reasonableness, and that even if the evidence was not admissible, there was no reasonable probability of a different outcome. The district court concluded that the state court's ruling was neither contrary to or an unreasonable application of clearly established federal law. We grant the COA because the issue is debatable among jurists of reason, but we affirm the district court's decision.

[12] The first prong of *Strickland* considers whether Lopez's counsel fell below an objective standard of reasonableness by failing to object to the evidence of prior injuries as Rule 404(b) evidence. 466 U.S. at 687-88. Even if we assume that the state court unreasonably determined that Lopez's counsel was not deficient for failing to at least object to this evidence, to satisfy the second prong of *Strickland*, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Dr. Henry's testimony clearly focused on the three major injuries that ultimately resulted in Anthony's death-injuries to his head, chest and abdomen. Occasional references to older bruises or healing rib fractures were made when describing the condition of the body at the time of the autopsy. Dr. Henry also testified that the abdominal injuries might have occurred more than a day earlier, but that it was also possible they had been inflicted around the same time as the head injuries. But the truly damaging portion of Dr. Henry's testimony was not descriptions of other minor bruises

or injuries – it was his consistent testimony that Anthony's three serious injuries were not consistent with accidental injuries, were highly unlikely to have been cased by a falling nightstand as described by Lopez, and were not inflicted by a single blow, but by separate and very forceful blows to the head, chest and abdomen.

[13] Perhaps more importantly, the prosecution did not use any of Dr. Henry's testimony about prior injuries to argue Lopez's state of mind. The only reference to the prior bruises in the closing argument was to point out that the victim's mother was either not particularly observant or not credible. Instead, the focus of the closing argument mirrored the crux of Dr. Henry's testimony: the injuries Anthony suffered were not accidental, they required a great deal of force, and they likely required repetitive blows, which, the

prosecution argued, required effort and thought. The prosecution argued that the severity of Anthony's injuries simply did not permit a finding of recklessness-that Lopez had either intentionally and willfully inflicted these injuries on the child, or that it was some freak accident, but that there was no in between. The prosecution also pointed out the inconsistencies in Lopez's statements to police, his reluctance to take the child to the hospital, and the Lopez's explanation of what happened was inconsistent with the medical evidence.

[14] Although Lopez argues that the jury could have found recklessness but for the allegedly improper testimony about the prior bruises, we agree with the district court that the state court was not objectively unreasonable in determining that there was no reasonable probability of a different guilt phase outcome based on this record. We therefore affirm the district court's denial of Lopez's petition on this claim.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's holding in Parts II-V of the majority opinion. That is, I agree that the district court erred in concluding that Lopez's ineffective assistance of counsel claims for failure to investigate and present

mitigating evidence were unexhausted, and I agree that Lopez is not entitled to remand or relief on his claims that the Arizona Supreme Court denied him meaningful appellate review, that his lawyer deficient in failing to challenge Dr. Hobeich's testimony, or that his lawyer was deficient in failing to object to evidence of prior injuries.

However, because I conclude that Lopez has successfully demonstrated an unreasonable application of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), based on both the trial judge's and the Arizona Supreme Court's failure to consider his mens rea as a mitigating factor, I respectfully dissent from Part I of the majority's opinon.

I

I share the concern raised by Chief Justice Feldman I his special concurrence, namely the lack of any trial court findings on mens rea. The lack of such a finding creates a distinct constitutional problem under *Eddings* because there is no evidence that the Arizona courts actually considered mens rea as a mitigating factor.

This case is an outlier in our death penalty jurisprudence because the record is undisputed-and all parties seem to concede-that Lopez never intended to kill his son. Throughout trial, the prosecution emphasized that child abuse felony murder does not include an intent element. During the sentencing hearing, after Lopez's counsel stressed Lopez's lack of specific intent as a mitigating factor, the prosecution's only argument in rebuttal was the following analysis: that Lopez

knew from experience that children are vulnerable to injury, that Lopez intended to injure Anthony, and that "we can *infer* that [Lopez] intended the damage [the injuries] caused because of his very familiarity with children." (emphasis added). Then while arguing before the Supreme Court on direct appeal, the prosecution "conceded that there was little or no evidence of intent to kill and that the most probable explanation for the child's death was that Defendant became enraged, lost control, and beat the child quite seriously." State v. Lopez, 847 P.2d 1078, 1092 (Ariz. 1992) (Feldman, C.J., specially concurring). There was also evidence introduced at trial that Lopez attempted to administer CPR when Anthony stopped breathing and that Lopez was visibly upset by Anthony's death. This behavior is inconsistent with an intentional homicide.

Although the formation of a specific intent to kill is not a prerequisite to the imposition of a death penalty, *Tison v. Arizona*, 481 U.S. 137 (1987), the lack of a specific intent to kill is relevant to whether the death sentence is appropriate or an individual defendant. Notably, most child abuse felony murderers do not receive a sentence even approaching death, even though all such murders are undoubtedly death penalty eligible.

In short, this case is an unusual one. Lopez received the harshest sentence that the state is empowered to impose even though he never intended for his victim to die. This fact does not exempt him from the death penalty by any means. However, it does call into question the state courts' assessment of mitigation.

II

Under *Eddings*, a sentencer contemplating the death penalty has a constitutional obligation to consider, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

Proffers as a basis for a sentence less than death." 455 U.S. at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). Applying *Eddings* to this case, both the sentencing judge and the Arizona Supreme Court had a constitutional duty, before choosing or affirming a death sentence, to consider all mitigating factors that Lopez's trial counsel proffered.

During Lopez's sentencing hearing, his trial counsel spent considerable time arguing the Lopez's lack of specific intent militated against the death sentence. There is therefore no doubt that *Eddings* required the trial judge and the Arizona Supreme Court to consider Lopez's mens rea when deciding whether to impose and whether to affirm the death penalty. The only question before us, therefore, is whether or not the state courts did, in fat, consider Lopez's argument.

In reviewing the state court record for a potential *Eddings* violation, this court must, as the majority correctly notes, presume that the trial judge and the state Supreme Court actually considered all of the mitigating arguments that were presented. This presumption arises, first and foremost, form the blanket presumption

that state judges know and follow the law. It arises secondarily in this case from the trial judge's multiple assurances on record and that she was considering all of Lopez's proffered evidence and arguments. *Parker v. Dugger*, 498 U.S. 308, 315 (1991) ("We must assume that the trial judge considered all this [mitigation] evidence before passing sentence. For one thing, he said he did.") Under *Parker*, we must presume that the trial judge was neither disingenuous nor mistaken when she stated that she considered all mitigating arguments.

The *Parker* presumption, however, is neither conclusive nor irrebuttable. In *Parker* itself, the Supreme Court did not rely on the trial judge's assurance that he had considered all mitigating evidence. Rather, the Court examined the entire record, reconstructing the trial judge's decision-making process to determine whether or not that process included consid-

eration of non-statutory mitigating factors. The Court then rejected the *Eddings* claim, not because the trial judge had made a bare statement that he had considered mitigating evidence, but because the trial judge's final decision was inexplicable without reference to that evidence. Specifically, the Supreme Court pointed out that the trial judge had overridden the jury's recommended life sentence for only one of the two murders involved in the case. Although Parker had committed a dual homicide, he received the death sentence for one murder and a life sentence for the other. Because the aggravating circumstances applied to

both homicides, the Supreme Court reasoned that the only explanation for the differential sentencing was that the trial judge had considered non-statutory mitigating circumstances and had determined that those circumstances justified leniency with respect to only one of the murder. *Parker*, 498 U.S. at 316-17. In *Parker* itself, therefore, the initial presumption that the trial judge considered all mitigators was only a starting point. The presumption was not – and is not – conclusive.

Furthermore, the *Parker* presumption is easily rebuttable. As Justice O'Conner wrote in her *Eddings* concurrence, the qualitatively different nature of a death sentence requires reviewing courts "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." 455 U.S. at 119 (O'Connor, J., concurring). As a result, if there is any legitimate reason to believe that the trial judge excluded a mitigating factor from her consideration, then we should remand for resentencing. The consequences of error in a death case are too great to allow for speculation or fudging.

In the end, then, the *Parker* presumption is merely a rule for allocating burdens, which will determine the outcome only if the defendant or habeas petitioner offers no legitimate reason to doubt its validity in a particular case. If, however, a habeas petitioner can point to any legitimate evidence in the record that indicated the trial judge's exclusion of any factor

or evidence, then this court should grant the writ and remand for resentencing.

III

In this case, *Lopez* offers two theories to rebut the Parker presumption. First, he points to one instance in the record in which the trial judge stated that she would consider only those mitigating factors that were presented during the aggravation/mitigation hearing, impliedly to the exclusion of mitigating evidence adduced at trial. Lopez argues that that one statement should suffice, per Justice O'Connor's admonition against speculation, to undermine this court's confidence in the trial judge's *Eddings* compliance.

As a majority correctly concludes, Lopez takes that statement out of context. The trial judge's only point was that she would, consistently with Lopez's motion to strike, ignore certain statements that were included in the presentence report. As she made clear at several other points in the proceedings, the trial judge did not mean to imply that she would neglect mitigating evidence adduced at trial. The statement that Lopez emphasizes, therefore, does not introduce speculation or confusing when it is read in the context of the entire trial record. Lopez's first attempt to rebut the *Parker* presumption fails.

But Lopez offers a second theory, which is more compelling. Lopez directs our attention to Chief Justice Feldman's separate concurring opinion in the Arizona Supreme Court's decision of his direct appeal, which noted that the trial judge failed to make a statutorily required finding as to the potential mitigating effect of

Lopez's mens rea. *State v. Lopez*, 174 Ariz. 131, 145-46, 847 P.2d 1078 (1992) (Feldman, C.J., specially concurring). In his separate opinion, Chief Justice Feldman noted that A.R.S. § 13-703(D) requires trial judges to articulate specific findings with respect to any statutory mitigating factor that is present in the case. He also noted that the statute lists as a mitigating factor " 'any of the circumstances

of the offense.'" *Id.* at 145 (quoting A.R.S. § 13-703 (G)). Chief Justice Feldman then observed that I highly relevant circumstances of Lopez's offense was the possibility that Lopez "may never have formed an intent to dill." *Id.*

Contrary to the statutory articulation requirement, Lopez's trial judge never made a specific finding as to whether Lopez did, in fact, intend to kill Anthony or as to whether Lopez's lack of specific intent was or was not sufficiently mitigating to call for leniency. Because the trial judge did not articulate a specific finding related to the statutory mitigating factor of Lopez's intent, Chief Justice Feldman wrote that he preferred to remand the sentences for entry of that findings.

In our determination of whether the trial judge actually considered all of Lopez's proffered mitigating theories, the Arizona Chief Justice's opinion is highly relevant. The trial judge's failure to comply with statutory articulation requirements indicates that she might have failed to consider Lopez's lack of specific intent as a mitigating factor in the § 13-703 balance.

That is, if the trial judge had determined either that Lopez actually intended to kill Anthony or that Lopez's lack of specific intent to kill was insufficiently mitigating to call for leniency, then she should have articulated a § 13-703(D) finding to that effect. Because the trial judge did not make any such finding, we must conclude that one or two things happened: either she made a state statutory error by failing to enter a required finding or she made a federal constitutional error by failing to consider intent as a mitigating factor.1

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1 The majority here concludes: "Of course, the trial court did not specifically discuss *any* of the mitigating evidence that Lopez presented, so a failure to discuss this factor does not necessarily indicate it was not considered." Maj. Op. at 7335. As should be clear from this discussion and from Chief Justice Feldman's opinion, the failure to make an intent finding, unlike the failure to make findings related to non-statutory mitigators, is a legal error, not mere churlishness. That failure, therefore, had for more significance than the majority opinion assigns to it.

I would conclude that the letter possibility is the more likely, for two reasons. First, as noted, *Eddings* requires us to remand if there is any legitimate basis for finding that the sentencer neglected a mitigating factor. Even taken alone, the trial judge's statutory failure raises some ambiguity as to whether she included Lopez's mens rea in her aggravation/mitigation balance. Because we should err on the side of caution, avoiding

speculation, the statutory failure alone is enough to justify a remand.

Second-and more compellingly-there is a strong commonsensical likelihood, which gains support from the record, that neither the trial judge nor the state Supreme Court believed that intent should count as a mitigating factor. At the time of Lopez's sentencing, the United States Supreme Court had recently decided *Enmund v. Florida*, 458 U.S. 782 (1982), and had even more recently decided *Tison v. Arizona*, 481 U.S. 137 (1987). Both of those cases considered the role that a defendant's intent should play in an Eighth Amendment determination of whether the death penalty is an excessive punishment for a particular defendant. Specifically, *Enmund* held that, under the Eighth Amendment, the defendant must have a general intent to kill before he may be given a death sentence. *Tison* then clarified *Enmund*, holding that a reckless disregard for someone's life, combined with an intent to engage in conduct that endangers that person's life and ultimately results in his death, is sufficient to allow for the death penalty.

As the federal district court found in this case, there can be little doubt that Lopez's intentional child abuse included a reckless disregard for Anthony's life, sufficient to satisfy Eighth Amendment requirements under *Tison*. But the conclusion that Lopez had a sufficiently culpable mens rea to satisfy *Tison* is not the same as the conclusion that the holistic circumstances of the crime and of the defendant, taking a limited mens rea into account, justify a death penalty. That is, the

defendant's intent should play a dual role at the sentencing

phase. Intent is relevant in the first instance to determine whether the death penalty is even on the table, and it is relevant in the second instance to determine whether, on balance, the aggravating and mitigating characteristics of the defendant and the crime militate in favor of (or against) leniency. The individualized analysis that *Eddings* requires must include holistic anaylsis of whether the characteristics of the defendant and the circumstances of the crime – including the defendant's mens rea – justify a death penalty.

In this case, the record strongly implies that the trial judge considered Lopez's intent argument only in its first role, as a *Tison* challenge. The Arizona Supreme Court then repeated that error by neglecting the argument altogether, presumably because the court assumed that intent was no longer relevant in light of Lopez's failure to bring a *Tison* challenge on direct appeal.

A

The trial judge's only referenced to Lopez's intent was her statement that Lopez "willfully and intentionally physically abused the child entrusted to his care and caused his death." This statement make perfect sense as a *Tison* finding; it clearly concludes that Lopez intended to engage in conduct that endangered Anthony's life, and it clearly concludes that the dangerous conduct cause

Anthony's death. Under *Tison*, that is all that the Eighth Amendment demands.

As Chief Justice Feldman concluded, however, the trial judge's statement falls far short of a §13-703(D) finding. First, the grammer of the statement make if difficult if not impossible to determine whether the intent finding attached only to abuse or also to homicide. That is, the trial judge might have meant only the Lopez willfully and intentionally abused Anthony and that the intentional abuse actually (though perhaps unintentionally) cause Anthony's death. On the other hand, she may have meant that Lopez willfully and

Intentionally physically abused Anthony and *willfully and intentionally* cause Anthony's death.2 Because of its phrasing, the finding is, Chief Justice Feldman believed, too ambiguous to satisfy § 13-703(D). The judge's statement does not draw a clear conclusion as to whether Lopez intended for his soon to die.

Second, the statement does not, at § 13-703(D) requires, include any articulation of the finding's effect on the overall § 13-703 balance. That is, even assuming that the trial judge's statement sufficiently clarified that Lopez did, in fact, intend to kill his son, the trial judge should also have stated – explicitly on record – the resulting conclusion that Lopez's proffer failed to provide a mitigating circumstance. In other words, if the trial judge had considered Lopez's argument as a mitigating factor – and not just as a *Tison* challenger – she would have said more.

2 Interestingly, the sentencing transcript and the minute entry, both of which include the intent finding, punctuate the finding slightly differently; an important comma is missing from the minute entry. In the sentencing hearing transcript, the trial judge is quoted with the following commas: "[T]he court finds beyond a reasonable doubt that the defendant, the father of the child, Anthony, willfully, and intentionally, physically abused the child entrusted to his care and caused his death." In the minute entry, however, the trial judge wrote: "THE COURT FINDS, as to Count 2, FIRST DECREE MURDER, a beyond a reasonable doubt that the defendant, father of the child Anthony, willfully and intentionally physically abused the child entrusted to his care and caused his death." The comma following "willfully and intentionally" in the sentencing transcript gives that phrase an independent and lasting significance, such that it might be read to attach to both halves of the following phrase. The absence of the comma in the written order is then significant since "willfully and intentionally" become a seamless part of the immediately following phrase, "physically abused the child entrusted to his care." That phrase is then separated from the murder finding by the conjoining "and," such that the "willfully and intentionally" language might not carry over the "and" to attach to the homicide. Reading the minute entry, which is the finding that the judge herself might have been involved in punctuating, it seems highly possible that the intent finding attached only to abuse, not to murder.

In sum, the trial transcript raises a real possibility that the judge took Lopez's argument only as a *Tison* challenge, failing to consider the same argument in its second role as a statutory mitigator. Indeed, the transcript provides no support – except by speculation- that the trial judge specifically considered mens rea as a mitigating factor.

B

On direct appeal, the Arizona Supreme Court's majority opinion implicitly confirmed this view of the trial record and ultimately repeated the error. The Supreme Court's opinion strongly implied that the majority found no specific intent to kill, but the opinion proceeded to exclude that finding from its consideration of mitigating factors.

1

Although the Arizona Supreme court made no specific intent finding,3 the majority opinion did strongly indicate its belief that Lopez did *not* intend to kill Anthony. The court's implication to that effect came in ins analysis of a statutory aggravating factor that was based on the finding that Lopez was in a "heinous and depraved state of mind when he beat Anthony." Lopez, 174 Ariz. at 144. As the Supreme Court noted, there are five circumstances that may support a finding of heinousness and depravity: "(1) the murder's relishing of the murder; (2) the infliction of gratuitous violence on the victim; (3) the needless mutilation of the victim; (4) the senselessness of the murder; and, (5) the helplessness of the victim." *Id.* (*citing State v. Gretzler*,

135 Ariz. 42, 52, 659 P.2d 1, 11 (1983)). The first three of those factors, if present, would certainly demonstrate a specific intent to kill; only someone intent on killing would relish the act, gratuitously beat the victim, and needlessly mutilate the body. But the last

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3 As noted, Lopez did not raise a *Tison* challenge on direct appeal. The Supreme Court, therefore, did not even make a specific *Tison* finding.

two circumstances-the senselessness of the murder and the helplessness of the victim – do not indicate anything about the defendant specific intent. A vehicular manslaughter of an infant passenger, for example, clearly would involve the senseless death of a helpless victim without involving a malicious intent on the part of the intoxicated driver.

For our purposes, it is therefore highly relevant that the Arizona Supreme Court relied *solely* on the last two factors when upholding the finding of heinousness and depravity in Lopez's case. The court's conclusion that none of the first three factors were present in this case strongly implies that the court found little to evidence of specific intent to kill. *Id.* In fact, the evidence that the Arizona Supreme Court cited to support its finding of senselessness was the very evidence that Chief Justice Feldman cited when arguing that Lopez probably did not intend to kill his son. In the words of the Supreme Court's majority opinion: "The murder of Anthony was senseless. Lopez admitted that after he had given

Anthony a bath and was putting lotion on him the infant 'peed, so I smacked him.'" *Lopez*, 174 Ariz. at 144. This finding is exactly the same as the concurring opinion's finding that "the most probable explanation for the child's death was [not that Lopez intended to kill Anthony, but rather] that Defendant became enraged, lost control, and bet the child quite seriously." *Id.* at 145. (Feldman, C.J., specially concurring). In short, the Supreme Court majority apparently could not support the aggravating factor or heinousness and depravity by reference to evidence of intent; on the contrary, the majority opinion implicitly agree with the concurrence's view that the murder, while senseless, was likely unintentional.

The upshot of this discussion is that the Arizona Supreme Court's logic confirms the view that this case probably involved - and the trial judge probably found - intentional abuse resulting in death, not intentional murder. Although Lopez's mens rea was sufficient culpable to allow a death sentence under *Tison* and to support a finding of heinousness

and depravity, neither of the state courts found that Lopez actually intended for his son to die.

2

After implicitly accepting that Lopez did not intend to kill his son, the Arizona Supreme Court's majority opinion then completely excluded that factor from its consideration of mitigating evidence. The majority opinion noted only that "[t]he vast majority of the

mitigation evidence presented by Lopez centered on his being a good parent and on the fact that he cared for children and never acted inappropriately with them." Lopez, 174 Ariz. at 145. The opinion then easily disposed of that mitigating argument – affirming the trial court's rejection of Lopez's character evidence – by noting that Lopez had another conviction for child molestation, which was before the trial judge at the time. But the Arizona Supreme Court's review and rejection of Lopez's character evidence comprised its entire consideration of mitigating factors. In the three paragraphs in which the majority opinion considered mitigation, there is not a single mention of Lopez's mens rea.

The absence of Lopez's intent argument from the Supreme Court's analysis is particularly telling in light of the special concurrence. The entire raison d'etre of Chief Justice Feldman's opinion was to pint out that § 13-703(g) required the trial judge to consider Lopez's mens rea as a mitigating factor. The majority opinion completely (though silently) rejected that argument. As noted, however, the majority implicitly agreed with – and certainly made no effort to rebut – the concurrence's conclusion that Lopez probably did not intend to murder his son, thereby indicating that the basis for disagreement between the majority and the concurrence could not have been the factual conclusion. Rather, as indicated by the majority's complete failure to include intent in its discussion of mitigating evidence, the basis for disagreement must have been a question as to whether mens rea counts as a statutory mitigator at all. The majority of the Arizona Supreme

Court apparently believed that it did not. As previously noted, that belief was not unfathomable at the time, given that the United States Supreme Court had recently given mens rea a unique role in death penalty decision making. The Arizona Supreme Court might have believed that *Enmund* and *Tison* removed mens rea from the aggravation/mitigation balance, giving the factor an entirely separate role.

Nevertheless, by excluding the Lopez's intent argument from its consideration of mitigating factors, the majority opinion committed an even clearer *Eddings* violation than the trial court. Although the trial transcript does not include any listing of mitigating factors – thereby making it somewhat difficult to determine which factors actually entered the trial judge's thought process – the Supreme Court's majority opinion specifically mentions the mitigating factors that it considered and clearly neglects Lopez's (and Chief Justice Feldman's) intent argument.

C

In conclusion, Chief Justice Feldman's concurring opinion sheds important light on the trial judge's and the majority opinion's thought processes. Neither the trial court nor the appellate count found that Lopez *did* intend to kill Anthony; the Supreme Court's majority opinion implied that Lopez probably did *not* intend to kill Anthony; and neither court made any finding as to the role that Lopez's potential of actual lack of intent played in its analysis of mitigating factors. Because a finding as to mitigation is statutorily required whenever the courts

consider mens rea as a mitigating factor, the failure to make the required findings is sufficient in itself to rebut the *Parker* presumption that the courts actually considered Lopez's proffer. Furthermore, in this case, the record indicates that both the trial judge and the Arizona Supreme Court took Lopez's intent argument only as a *Tison* challenge, neglecting to reevaluate the same argument in its second role as a mitigating factor. There is legitimate-indeed, strong-

record evidence to support the conclusion that both courts, contrary to *Eddings*, failed to consider Lopez's mens rea in the § 13-703 balance.

Particularly given Justice O'Conner's admonition against speculation, I would conclude that Lopez has demonstrated an *Eddings* violation.

IV

The final question is whether, under AEDPA, the state courts' failure to consider intent as a mitigating factor constitutes an "objectively unreasonable,"4 rather than simply an "incorrect or erroneous," application of *Eddings*. *See Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, (2003) (citing Williams v. Taylor, 529 U.S. 362, 410, 412, 120 S. Ct. 1495 (2000)). In this case, there can be little doubt that is does.

Eddings held, without qualification, that due process requires a sentencer to consider *all* mitigating factors that a defendant proffers. 455 U.S. at 114 ("The

sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."). The *Eddings* opinion also relied on Lockett v. Ohio, 438 U.S. 586 (1978), which explicitly held that the sentencer must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S.

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4 Because neither the trial judge nor the Arizona Supreme Court made any specific mention of the *Eddings* standard, I will not analyze the question under AEDPA's "contrary to" clause. *See* 28 U.S.C. §2254(d)(1). Although it appears that the state courts applied an entirely incorrect legal standard by assuming that intent is not a mitigating factor under *Eddings*, I cannot conclude with certainty that they did so. I will therefore confine my analysis to the stricter standard, which allows reversal only if the state courts' decisions "involved an unreasonable application" of the correct federal rule. *Id.*

at 604. There is no potential for reasonable minds to differ on the question of whether the defendant's intent fall within the scope of *Eddings* and *Lockett*. It does.

The dual role that mens rea must play in death penalty cases does not undermine this conclusion; in fact, it strengthens it. The fact that the Eight

Amendment contains a minimum culpability requirement demonstrates the critical importance of the defendant's mens rea in a death penalty decision. Although intent's dual role makes it *understandable* that a sentencing judge might fail to switch hats after making an *Enmund* finding, the dual role does not make the same failure *reasonable*. Even after establishing eligibility for the death penalty, *Eddings* clearly requires the sentencing judge to continue evaluating the whole crime, including mens rea, to determine whether the death penalty is actually appropriate for the individual defendant.

In this case, the applicable state law and the arguments presented at sentencing make the state courts' failures all the more unreasonable. First, to the extent that the *Lockett* requirement might have been ambiguous, the same requirement was codified in Arizona's criminal statutes. As Chief Justice Feldman note, A.R.S. § 13-703(G) specifically requires Arizona trial judges to consider "any of the circumstances of the offense." The trial judge's neglect of Lopez's mens rea, therefore, was not only a misapplication of Supreme court precedent but also a defiance of state statute, enhancing the unreasonableness of the *Eddings* violation.

Second, Lopez clearly proffered – indeed, emphasized – his mens rea as a mitigating factor. Although Lopez focused primarily on his good character during the aggravation/mitigation hearing, his counsel focused almost exclusively on intent throughout the sentencing hearing. In fact, in his last statement to trial judge before the sentence was imposed, Lopez's attorney said:

> I think the one single most important thing here, in this case, is that there's been no showing, at all, that George ever intended that baby to die [.] . . . I would say that everything points to the contrary. That if that were his intent, there would be different facts before you and, under these circumstances, I think he's going to be punished enough by getting the sentence that the Court has to impose.

Given that Lopez's intent argument was the last thing – and "the one single most important thing" – that his attorney offered in mitigation, the trial judge's and the Arizona Supreme Court's failure to consider it was objectively unreasonable.

I therefore would conclude that Lopez is entitled to relief under AEDPA on his certified *Eddings* claim, and I would grant the writ of habeas corpus with respect to that claim, remanding his case to the Arizona courts for resentencing.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

George M. Lopez,	)	No. CV-97-224-TUC-CKJ
	)	
Petitioner,	)	DEATH PENALTY CASE
	)	
v.	)	**MEMORANDUM**
DECISION		
	)	**AND ORDER**
Dora Schriro, et al.,[1]	)	
	)	
Respondents.	)	
	)	

Petitioner George Molina Lopez ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Amended Petition raises twelve claims, some with subparts.[2] By Order dated December 3,

[1] Dora Schriro, Director of the Arizona Department of Corrections, is substituted pursuant to Fed. R. Civ. P. 25 (d)(1).

[2] On March 8, 2005, Petitioner filed with the Court a "Notice of Intent to Lodge Second Amended Petition for Writ of Habeas Corpus." (Dkt. 69.) Thereafter, on April 29, 2005, Petitioner filed a motion to amend his First Amended Petition to add four additional claims. (Dkt. 71.) Petitioner's motion is addressed herein.

1999, the Court determined that Claims 1 (in part), 2, 4, 7, 12-F, 12-H, and 12-K were entitled to further review and that all other claims were procedurally barred and/or meritless. (Dkt. 53.) This Order reviews the merits of the remaining seven claims. For the reasons stated herein, the Court finds that Petitioner is not entitled to federal habeas relief.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner met Anna Abeyta in 1987, and together they had a son, Anthony. On August 26, 1989, when Anthony was one year and nine days old, Anna left the family apartment to go grocery shopping, leaving Anthony in Petitioner's care. (Record Transcript 04/05/90 at 116.)[3] When she returned home two hours later, Petitioner told her there had been an accident. (Id. at 118.) Petitioner claimed that Anthony, who was learning to walk, was standing in front of a nightstand and had pulled it over on top of himself. (Id. at 128-29.)

Anna saw that Anthony had a bruise on both his forehead and chin, and that he felt cool to the touch. (Id. at 128, 133.) She wanted to take him to the hospital, but Petitioner refused, saying he would be okay. (Id. at 133.) Later, Anna noticed that Anthony's stomach felt hot and he was acting fussy. (Id. at 134.) She again suggested taking Anthony to the hospital, and Petitioner again refused. (Id. at 135) After leaving to do laundry, Ana returned to find Petitioner doing CPR on Anthony. (Id.) They took him to the emergency room, but resuscitation efforts were

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[3] Hereinafter "R.T."

unsuccessful. (Id. at 138-114-15.) Anthony was declared dead at 3:36 p.m. (Id. at 115.)

At the time of this death, Anthony had bruises and abrasions on his ear, a bruise on the bridge of his nose, and multiple hemorrhages in his lips. (Id. at 82, 79, 78.) the medical examiner testified that these injuries had been inflicted within 24 hours of this death. (Id. at 78-80.) Anthony also had bruises above his eyebrow, on the side of his jaw and under his chin, which the medical examiner testified were older injuries. (Id. at 80-81.) The medical examiner also found bruises of various ages ranging from Anthony's left underarm down to his chest, on the right side of his back, and on the right side of his chest and shoulder. (Id. at 96-97.)

An autopsy revealed that Anthony's skull had been broken with such force that the right side had been driven into his brain. (Id at 87-88.) Head fractures had caused extensive bleeding in the membrane separating Anthony's brain from his skull. (Id. at 90.) In addition, two of Anthony's ribs were fractured near the spine, corresponding to the bruises on his back and causing a bruise on is lung. (Id. at 104.) The medical examiner determined that these fractures had been caused within 24 hours of Anthony's death. Additional fractures found on several ribs were found to be older injuries that had been healing when Anthony died. (Id. at 104-06.)

The autopsy also revealed that Anthony's pancreas had been torn in half, his bowel and the membrane holding it in place had been lacerated, and his spleen and adrenal gland had hemorrhaged. (Id. at 107-09.) Anthony's abdomen contained "bloody, foul-smelling" fluid and the membrane

lining his intestine had been infected or inflamed. (Id. at 102-03.) The injuries to Anthony's abdomen had caused peritonitis (infection and inflammation of the gastrointestinal organs). (Id. at 110-11.) All of these injuries had been caused within 24 hours of death. (Id. at 104, 110-13.) The medical examiner determined that Anthony died fro "blunt-force trauma to the head, chest and abdomen." (Id. at 113.)

At the hospital, Petitioner was interviewed several times over a three-hour period by law enforcement officers. To each, he provided somewhat different variations of the "nightstand" story he had told Anna. Detectives consulted with the medical examiner, who asserted that that the injuries Anthony suffered were not consistent with Petitioner's stories. (Id. at 115-20.) A search warrant was obtained, and the detectives went to the apartment with Petitioner, who demonstrated how Anthony was injured. (Id. at 18-32.) After the demonstration, Petitioner was arrested.

On April 10, 1990, a jury convicted Petitioner of intentional child abuse and felony murder. (R.T. 04/10/90 at 129-30.) The trial court held an aggravation/mitigation hearing on May 10, 1990. (R.T. 05/10/90 at 6.) On May 17, 1990, the trial court sentenced Petitioner to 22 years imprisonment for the child abuse conviction, ordering the sentence to run consecutive to the sentence imposed for Petitioner's prior child molestation conviction. (R.T. 05/17/90 at 18.) On the first-degree murder conviction, the trial court found that the state had proved two aggravating circumstances, that Petitioner: (1) committed the murder in an especially heinous, cruel or depraved manner; and (2) was an adult and the victim was under the age of 15 at the time of the murder. (Id. at 19.) The trial court found no

mitigating circumstances and sentenced Petitioner to death. (Id. at 19-20.)

On direct appeal, the Arizona Supreme Court affirmed. See State v. Lopez, 174 Ariz. 131, 847 P.2d 1078 (1992), cert. denied, 510 U.S. 894 (1993). Petitioner filed a petition for post-conviction relief in state court on July 6, 1994. Hearings on the petition were held on May 2-3, June 13, and September 25, 1995; on January 19, 1996, the trial judge denied relief. In December 1996, the Arizona Supreme Court denied review. Petitioner filed a Petition for Writ of Habeas Corpus in this Court on March 17, 1997, and on Amended Petition on November 21, 1997.

On April 29, 2005, Petitioner filed a motion to amend his first amended petition and lodged a Second Amended Petition, adding four new claims (Dkt. 71.) The Court will first rule on the merits of the claims already deemed procedurally exhausted (dkt. 53) and then address the status of the four claims proposed in Petitioner's motion to amend. (Dkt. 71.)

LEGAL STANDARD FOR FEDERAL HABEAS RELIEF

A federal court may grant habeas relief only if the petitioner demonstrates "that he is in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a) (1996). Because Petitioner filed his petition after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) ("AEDPA"). For properly preserved claims "adjudicated on the merits" by a state court, the AEDPA enacted a more rigorous standard for habeas relief.

See Miller-El v. Cockrell, 537 U.S. 322, 337 (2003); Lambert v. Blodgett, 393 F.3d 943, 965 (9th Cir. 2004) ("Inspired by principles of comity, finality and federalism, AEDPA establishes a highly deferential standard for reviewing state court determinations.")

Pursuant to the AEDPA, Petitioner is not entitled to relief on any claim adjudicated on the merits in state court unless that adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Further, section 2254(e)(1) provides

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

A. 2254(d)(1)

To assess a habeas claim under § 2254(d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law includes the holdings of the Supreme Court at the time the petitioner's state court conviction became final.[4] See Williams v. Taylor, 529 U.S. 362, 365 (2000). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. See id. at 381. A state court decision is "contrary to" clearly established federal law if it fails to apply the correct controlling Supreme Court authority, or if it applied the correct authority to a case involving facts materially indistinguishable from those in a controlling Supreme Court case, but nonetheless reached a different result. Id. at 413; see also Lockyer v. Andrade, 538 U.S. 63, 72 (2003); Brewer v. Hall, 378 F.3d 952, 955 (9th Cir.), cert. denied, 125 S.Ct. 814 (2004). Whether a state court's interpretation of federal law is contrary to Supreme Court authority, as opposed to an unreasonable application thereof, is a question of federal law as to which federal courts owe no deference to the state courts. Cordova v. Baca, 346 F.3d 924, 929 (9th Cir. 2003).

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4 The Supreme Court's analysis of whether a claim is based on "clearly established" federal law under § 2254(d)(1) is related to the standard set out in Teague v. Lane, 489 U.S. 288 (1989). That is, Supreme Court precedent which would qualify as an "old rule" under Teague would necessarily be "clearly established" federal law under § 2254(d)(1). See Teague, 489 U.S. at 301.

A state court decision amounts to an "unreasonable application" under § 2254(d)(1) if the state court correctly identifies the governing "clearly established" legal principle from the Supreme Court's decisions, but then makes an objectively unreasonable application of that principle to the facts of the petitioner's case. See Andrade, 538 U.S. at 75. An "objectively unreasonable" application of federal law involves more than an incorrect or even clearly erroneous application of federal law. See Williams, 529 U.S. at 410-11 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."). In contrast to the "contrary to" prong of § 2254(d)(1), the AEDPA mandates deferential review of a state court's application of clearly established Supreme Court precedent. See Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citing Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997)).

In considering a challenge under either the "contrary to" or "unreasonable application" prong of subsection (d)(1), state court factual determinations are presumed correct pursuant to § 2254(e)(1) and can be rebutted only by clear and convincing evidence. See Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.), cert. denied, 125 S.Ct. 470 (2004).

A. § 2254(d)(1)

To obtain habeas relief under subsection (d)(1), the state court factual determinations at issue must be "objectively unreasonable" in light of the evidence presented in the state court proceeding. Miller-El, 537 U.S. at 340; Lambert v. Blackwell, 387 F.3d 210, 233 (3d Cir.

2003). As explained by the Ninth Circuit, the "unreasonable determination" clause

> applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, see, e.g., Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2538-39, 156 L.Ed.2d 471 (20030, Ward v. Sternes, 334 F.3d 696, 704-08 (7th Cir. 2003), that the process employed by the state court is defective, see, eg., Nunes v. Mueller, 350 F.3d 1045, 1055-56 (9th Cir. 2003), Valdez v. Cockrell, 274 F.3d 941, 961-68 (5th Cir. 2001)(Dennis J., dissenting), or that no finding was made by the state court at all, see, e.g., Weaver v. Thompson, 197 F.3d 359, 363 (9th Cir. 1999), cf. Wiggins, 123 S. Ct. at 2539-41

Taylor, 366 F.3d at 999; cf. Norton v. Spencer, 351 F.3d 1, 7 (1st Cir. 2003) (describing grounds to find state court factual determinations unreasonable under (d)(2))

When a petitioner challenges a state court's factual findings under subsection (d)(2), a federal court must be satisfied that an appellate court could not reasonably affirm the finding. Taylor, 366 F.3d at 1000. "Once the state court's fact-finding process survives this intrinsic review, the state court's findings are dressed in a presumption of correctness which then helps steel them against any challenge based on an extrinsic evidence, i.e., evidence presented for the first time in federal court." Id. The presumption of correctness may be overcome only by clear and convincing evidence, pursuant to 28 U.S.C. §

2254(e)(1). Id.; see Nunes v. Mueller, 350 F.3d 1045, 1055-56 (9th Cir. 2003), cert. denied 125 S.Ct. 808 (2004).

DISCUSSION

Claim 1: Failure to Consider Mitigation

Petitioner alleges hat the trial court failed to consider all mitigation evidence introduced during his trial, aggravation/mitigation hearing, and sentencing in violation of the Eighth and Fourteenth Amendments. (Dkt. 35 at 9.) Petitioner asserts that the trial court failed to consider his: (1) good character generally and as a parent, (2) good behavior while incarcerated, (3) military service, and (4) lack of intent to kill Anthony. (Id. at 5, 7.)

The clearly established Supreme Court law regarding consideration of mitigation is set for the in Lockett v. Ohio and Eddings v. Oklahoma, which hold that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings, 455 U.S. 104, 110 (1982) (quoting Lockett, 438 U.S. 586, 604 (1978)). The Constitution and the clearly established law require only that the sentencing court hear and consider all mitigation evidence, but the court may determine the *weight* to accord such evidence. Id. at 114-15. In assessing Petitioner's claim for habeas relief, the Court's inquiry here is not, as Petitioner would have it, to evaluate the substance of each an every piece of evidence submitted as mitigation. See Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (holding that when it is

evident that all mitigating evidence was considered, trial court is not required to discuss each piece of such evidence). Rather, the Court assesses whether the Arizona Supreme Court's conclusion – was contrary to or an unreasonable application of the principles set forth in Lockett and Eddings.

At sentencing, the trial acknowledged having heard all the evidence at trial, aggravation/mitigation hearing, post-trial motions, and sentencing argument, and stated that "[t]he Court will proceed with sentencing at this time . . ." (R.T. 05/17/90 at 4-8.) With respect to the first degree murder charge, after finding two aggravating factors, the trial court stated its ruling with respect to mitigating factors as follows:

> The Court finds no mitigation factors as set forth in 13-703 (G). *The Court has considered all evidence presented by the defendant by way of mitigation.* The victim, a child of 12 months and 9 days of age, was at the mercy of the defendant with no ability to protect or defend himself. His suffering was apparent or foreseeable, but defendant's selfish concern to shield himself from the consequences of his own actions caused him to deny the child any hope for life or the surcease of his pain through medical treatment.
>
> The Court finds that the cruelty and depravity of the defendant's act towards the innocent, helpless baby in his care far outweigh any evidence which might call for leniency. Therefore, as to Count Two, First Degree Murder, it is the judgment and sentence of the Court that the defendant be committed to the Arizona

Department Corrections and shall be put to death by lethal gas.

(Id. at 19-20; emphasis added.)

The crux of Petitioner's argument in support of Claim 1 rests on the following statement made by the trial judge prior to sentencing:

> For the record, the Court has read the presentence report, the letters and other documents submitted by the defendant in the time period since the verdict was entered — largely since the presentence was prepared and filed, as well as this Court's having heard the trial and the aggravation/mitigation hearing on May the 10th, 1990. *As to Count Two [the capital felony murder count], the Court is considering only those factors presented at the aggravation/mitigation hearing.* As to Count one [the noncapital intentional child abuse count], the Court is considering the information set forth in the presentence report.

(R.T. 05/17/90 at 9; emphasis added.) Petitioner contends that the emphasized language in this quotation establishes the trial court's failure to consider all mitigation evidence.[7] However, a careful review of the entirety of the sentencing record reveals that this statement standing alone is out of context and does not support Petitioner's argument.

[7] In his Amended Petition, Petitioner raised a separate claim based on this statement, alleging that the trial court improperly limited the scope of mitigation. That claim was found to be procedurally defaulted. (See, Dkt. 53 at 7-16.)

After a jury found Petitioner guilty, but prior to sentencing, Petitioner filed motions to strike from the presentence report statements that he made to the presentence officer and statements made by the victim's family members. (Record on Appeal at 435, 449.)[6] At the start of the sentencing hearing, the trial court addressed Petitioner's post-verdict motions separately, stating,

> Defendant's motion to strike defendant's statement in the presentence report, that motion is granted, consistent with the Court's decision to rely upon evidence in trial and the presentence hearing. I'm more specific about the evidence upon which I relied later in this proceeding. Defendant's motion to strike and exclude the victim's statement is granted, with the same statements as set forth above in the motion to strike the defendant's statements.

(R.T. 05/14/90 at 3; emphasis added.)

The subsequent statement by the trial court regarding consideration of the "factors" presented at aggravation/mitigation hearing was made in the context of ruling on Petitioner's motions. By starting that it would consider "only those factors presented at the aggravation/mitigation hearing" (id. at 9), it appears the trial court was simply reiterating its decision *not* to use the presentence report (and the objectionable letters and statements contained therein) in sentencing on the capital count, consistent with its ruling that it would instead "rely

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[6] Hereinafter "R.O.A." The court received the record in this case from the Arizona Supreme Court and Pima County Superior Court on June 16, 1997. (See Dkt. 20.)

upon evidence received in trial and the presentence hearing" (id. at 3). The trial court further explained its ruling on Petitioner's motion by stating that, as to the noncapital child abuse count, it *would* consider the presentence report. In fact, the first nine pages of the sentencing record transcript focus on Petitioner's post-verdict motions, following which the trial court transitioned to hear oral argument on sentencing. (Id. at 1-9.)

The Court finds that the statement does not lend support to Petitioner's argument that the trial court failed to consider proffered mitigation, but rather explains the court's ruling on Petitioner's motion to preclude consideration of certain letters and statements contained in the presentence report. The trial court did not categorically exclude the presentation or consideration of any type of mitigation. See Eddings, 455 U.S. at 113-14 (holding that court may not refuse to consider mitigating evidence as a matter of law); Lockett, 438 U.S. at 608 (holding that statute may not categorically exclude consideration of mitigating evidence). Further, the court specifically stated that it considered all mitigating evidence presented by Petitioner. See Parker v. Dugger, 498 U.S. 308, 314 (1991) (holding that a court is deemed to have taken into account all mitigating evidence where the court so states).

On direct appeal, the Arizona Supreme Court held that, although the trial court did not specifically address each factor offered as mitigation, "[t]he record before us clearly indicates that the trial judge considered all the mitigating factors presented by Lopez." Lopez, 174 Ariz. at 144, 847 P.2d at 1091. The court indicated that the fact that the trial court found no mitigation sufficient to outweigh the

aggravating factors did not demonstrate a failure to consider mitigation. To the contrary, the Arizona Supreme Court concluded that "[w]e believe the trial court could properly find that the record refuted the proffered mitigating circumstances." Id. at 145. This Court finds that the state supreme court's ruling was not contrary to, or an unreasonable application of, Lockett and Eddings. See 28 U.S.C. § 2254(d)(1). Therefore, Petitioner is not entitled to relief on Claim 1.

Moreover, as Petitioner points out, the Arizona Supreme Court conducted a separate, independent review of the aggravating and mitigating factors and determined that Petitioner's death sentence was appropriate. Lopez, 174 Ariz. at 143, 847 P.2d at 1090. The court independently analyzed the mitigation evidence proffered by Petitioner, stating that:

> The vast majority of the mitigation evidence presented by Lopez centered on his being a good parent and on the fact that he cared for children and never acted inappropriately with them. However the trial court had before it the record of Lopez' conviction for child molestation, a class 2 felony . . . . The trial court may take cognizance of evidence tending to refute a mitigating circumstance. [citation omitted] We believe the trial court could properly find that the record refuted the proffered mitigating circumstances.

Id. at 145. Even if the trial court had committed constitutional error at sentencing, a proper and independent review of the mitigation and aggravation by the Arizona Supreme Court cured any such defect. See Clemons v.

Mississippi, 494 U.S. 738, 750, 754 (1990) holding that appellate courts area able to fully consider mitigating evidence and are constitutionally permitted to affirm a death sentence based on independent re-weighing despite any error at sentencing).

Claim 2: Constitutional Adequacy of Sentencing Record

In Claim 2, Petitioner alleges that the trial court failed to create a constitutionally adequate record of what mitigating evidence was considered at sentencing. (Dkt. 57 at 6, 18.) This claim is composed of two subparts. Petitioner alleges that (A) the trial court failed to produce an adequate sentencing record by which the Arizona Supreme Court could conduct is constitutionally mandated review of the propriety of the death sentence, and (B) the trial court failed to make an adequate sentencing record of whether it considered all mitigation, in violation of the Eighth and Fourteenth Amendments. (Id. at 18, 28.) As discussed above, it is clear from the sentencing record that the trial court *did* consider all mitigation evidence proffered; therefore, Petitioner is not entitled to relief on Claim 2-B.

In Claim 2-A, Petitioner contends the trial court failed to provide an adequate record by which the Arizona Supreme Court could conduct its independent review of the propriety of the death sentence in his case.[7] Petitioner cites no cases that directly support his position, but grounds his

[7] To the extent Petitioner is asserting that the trial court failed to follow state law by not listing each mitigating factor, this is not a cognizable claim for federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67 (1991).

claim on the general principles of appellate review set out in Pulley v. Harris, 465 U.S. 37, 50 (1984), and Parker v. Dugger, 498 U.S. at 321. There is no constitutional requirement that a particular sentencing record be produced by the trial court. Rather, Pulley and Parker simply set forth the constitutional mandate that appellate review of a death sentence requires an individualized review of he defendant and the circumstances of the crime. Id. Because the merits of Petitioner's claim are not squarely governed by clearly established Supreme Court law for purposes of § 2254(d)(1), it fails as a matter of law.

Furthermore, as previously stated, the Arizona Supreme Court conducted an independent review of Petitioner's death sentence, which included an independent determination of the existence of aggravating and mitigating circumstances. See Lopez, 174 Ariz. at 143, 847 P.2d at 1090. The court stated, "[a]s in every death penalty case, this court must review the record and make an independent determination of whether the death sentence is appropriate." Id. This review was not limited to the sentencing "record" created by the trial court, but extended to the entire evidentiary records. In State v. White, the court explained:

> This independent review includes a painstaking search of the entire record for error, an examination of the facts that establish the presence or absence of aggravating and mitigating circumstances, and a separate determination of whether the latter circumstances outweigh the former when both are present.

168 Ariz. 500, 521, 815 P.2d 869, 890 (1991), abrogated on other grounds by State v. Salazar, 173 Ariz. 399, 844 P2.d 566 (1992). Moreover, the Arizona Supreme Court has indicated that it automatically reviews the entire record, and all evidence of aggravation/mitigation, even when no sentencing error is alleged on appeal. See, e.g., State v. Rogovich, 188 Ariz. 38, 44-45, 932 P.2d 794, 800-01 (1997). Because the state supreme court's review is not dependent on the trial court's sentencing record, any alleged deficiencies in that record do not inhibit the state appellate court's constitutional review. Petitioner is not entitled to habeas relief on Claim 2.

Claim 4: Voluntariness of Petitioner's Statements to Detective Millstone

Petitioner alleges that inculpatory statements made at hospital the day Anthony died were coerced, rendering the statements constitutionally involuntary. (Dkt. 35 at 4, 7.) Specifically, Petitioner alleges that his statements were involuntary because they were induced by a promise from Detective Millstone to not play their tape-recorded conversation, nor relate its details, to Anthony's mother. (Id. at 4; Dkt. 57 at 33-34.) On direct appeal, the Arizona Supreme Court noted that under Hutto v. Ross, 429, U.S. 28 (1976), direct or implied promises of benefits or leniency are impermissibly coercive. Lopez, 174 Ariz. at 138, 847 P.2d at 1085. In addition, the court observed that a statement will be considered involuntary only if it is established that a promise of a benefit or leniency was in fact made, and that the defendant relied on the promise in making inculpatory statements. Id.

A Petitioner's Statements

Immediately following Anthony's death, Petitioner was interviewed by Police Officer Mardula, who read him his Miranda rights.[8] (R.T. 04/05/90 at 7-8.) Petitioner relayed the same "nightstand" story he had told Anna. (Id. at 9.) Petitioner claimed that although Anthony appeared to be "okay," Petitioner watched him closely for the next two hours. (Id. at 9-10.) Petitioner stated that later, when he was helping Anna with the laundry, he noticed that Anthony was not breathing, so he performed CPR and he and Anna took Anthony to the hospital. (Id. at 10-11.)

Later that afternoon, Detectives Miller and Salgado arrived at the hospital to interview Petitioner. (Id. at 165-66.) After initially restating that the nightstand had fallen on Anthony, during the course of the interview, Petitioner told several different versions of what had happened. (Id. at 170-88.) First, Petitioner said that Anna was home at the time of the accident. (Id. at 169-70.) Next, Petitioner claimed that Anthony had actually climbed inside the middle drawer of the nightstand and that not only had the nightstand fallen on him, but also the bookshelf, fan, lamp, and radio.[9] (Id. at 174, 177.) Then, Petitioner claimed that, as he returned to the bedroom, a bookshelf began to fall. In an attempt to prevent the articles on the shelf from falling on Anthony, he dove, landing on the nightstand, which then fell. (Id. at 185-86.) At this point, Detective Salgado read Petitioner his Miranda rights. (Id. at 87-88.) Petitioner indicated that he understood his rights and would continue to answer questions. (R.T. 04/06/90 at 49.) The detectives

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[8] Miranda v. Arizona, 384 U.S. 436 (1966).

[9] However, when detectives visited the apartment, they found the fan with an undisturbed coat of dust and a dust ring around the base of the lamp. (R.T. 04/06/90 at 31.)

concluded the interview and left the room at approximately 7:00 p.m. (R.T. 04/02/90 at 89.)

Petitioner was then interviewed by Detective Millstone, who specialized in child abuse and homicide. (R.T. 04/06/90 at 56-57.) Petitioner again denied ever hitting Anthony. (Id. at 58.) Believing the tape recorder was affecting Petitioner's candor, Detective Millstone turned it off and asked Petitioner if he had concerns about answering questions. (Id. at 64-65.) Petitioner said he was afraid Anthony's mother might hear the tape. (Id.) Detective Millstone told Petitioner he was not going to play the tape for her nor relate the details of the interview to her. (Id.) Petitioner then stated: "I got angry, I got angry at everything, everything that has been boiling over. I've been very angry these past couple of days and Anna knows that and everybody knew it." (Id. at 59, 64.) Petitioner stated that earlier that day he had given Anthony a bath and laid him down to put lotion on him and "he peed, so I smacked him." (Id. at 60.) Petitioner then explained that he got angry and left the room to dispose of the diaper. (Id.) When he returned, Anthony was standing by the nightstand. (Id. at 61.) Petitioner yelled, Anthony grabbed at the lamp and nightstand, and the nightstand fell on top of Anthony. (Id.) While trying to secure the lamp, radio and fan, Petitioner fell on top of the nightstand with Anthony underneath. (Id. at 62.) When Petitioner pulled the items away, the radio accidentally slipped and fell on Anthony's face. (Id.) Detective Millstone concluded the interview at approximately 7:30 p.m. (R.T. 04/02/90 at 88.)

Detective Miller, joined by Detective Godoy, returned to interview Petitioner regarding remaining questions about the circumstances surrounding Anthony's

death. (Id. at 89-90.) During the brief interview, Petitioner admitted that he had lied to Detective Miller earlier that day. (Id. at 91.) While Petitioner maintained that the nightstand had fallen on Anthony, he told the Detectives he felt bad that his negligence killed his son and stated, "for killing my own child, I hope I rot in Hell." (Id. at 91-92.)

B. Voluntariness

The question of whether Petitioner's inculpatory statements were voluntary is a mixed question of law and fact. See Miller v. Fenton, 474 U.S. 104, 111-12 (1985). As such, the state court's legal conclusion must be separated from the factual determinations underlying it. Lambert, 393 F.3d at 977-78. "Fact-finding underlying the state court's decision is accorded the full deference of §§ 2254(d)(2) and (e)(1), while the stat court's conclusion as to the ultimate legal issue – or the application of federal law to the factual finding – is reviewed per § 2254(d)(1." Id. Petitioner argues that the Arizona Supreme Court's conclusions that (1) Detective Millstone did not make a promise, and (2) Petitioner did not rely on any promise in making inculpatory statements, are "unreasonable determinations of the facts" in light of the record.[10] Accordingly, to obtain habeas relief, Petitioner must establish that the state court's factual determinations are *objectively unreasonable* in light of the

[10] Petitioner does not assert, with respect to Claim 4, that the Arizona Supreme Court's legal conclusion is contrary to, or an unreasonable application of, clearly established federal law under § 2254(d)(1). Rather, he challenges solely the Arizona Supreme Court's factual findings underlying its voluntariness conclusion.

evidence presented in state court. Miller-El, 537 U.S. at 340; 28 U.S.C. § 2254(d)(2).

In determining that Detective Millstone did not make a "promise" to Petitioner, the Arizona Supreme Court referenced the detective's testimony during a suppression hearing. Specifically, when asked why he had turned off the tape recorder while interviewing Petitioner, Detective Millstone stated:

> I wanted to know what concerns he had about the tape recorder as I felt that the tape recorder might be interfering with his talking to me.
>
> He evidenced some concerns to me about his wife finding out more of the facts that had occurred and that he was fearful of that and that's what he expressed to me at that time.
>
> We talked about that. We came to an agreement that I certainly wasn't going to play the tape for his wife or that I wasn't personally going to sit down and discuss the details of what he told me with his wife at all and that seemed to calm him, and at that point he seemed to feel - or at least he began speaking to me in a more truthful way, I felt.

(R.T. 04/02/90 at 101-02.) During cross-examination at trial, the following exchange took place between Petitioner's trial counsel and Detective Millstone:

Q: In fact, what appears on the tape just prior to him saying, I got angry, I got angry at everything - what appears on the tape just prior to that is that you give him

your word that you won't tell Anna about what he's about to tell you isn't that right?

A: That is correct, sir.

Q: And that was something you had promised him when you went off the tape?

A: That is correct, sir?

(R.T. 04/06/90 at 64-65.)

After reviewing the record, the Arizona Supreme Court concluded: "Detective Millstone made no promise to Lopez, he merely stated the fact that he was not going to play the tape for Anthony's mother or discuss the interview with her." Lopez, 174 Ariz. at 138, 847 P.2d at 1085. Detective Millstone's testimony at the suppression hearing directly supports the finding of the Arizona Supreme Court. While Detective Millstone's statement to Petitioner was framed by defense counsel as a "promise" during cross-examination at trial, the state supreme court's finding that it was not a promise of *benefits or lenience* was not "objectively unreasonable" and is supported by the evidence. Accordingly, pursuant to § 2254(d)(2), this Court must accord full deference to the sate court's finding that Detective Millstone's statement to Petitioner did not amount to an impressible promise under Hutto v. Ross.

Petitioner attempts to overcome this presumption of correctness by referencing part of the transcribed interrogation by Detective Millstone that was never

considered by the state court.[11] Specifically, Petitioner relies on the following exchange:

Q [Det. Millstone]: I've given you my word I would not tell your wife what you're going to tell me.

A [Petitioner]: Or anybody...

Q: Other than the prosecutor and the judge.

A: Yes.

Q: All right. You have my word on that.

(Dkt. 35, Ex. 2 at 3-4.) Immediately thereafter Petitioner makes the statement that he was angry "at everything, everything that's been boiling over" and that he smacked Anthony for peeing while changing the diaper. However, this "new" evidence not only failed to overcome the clear and convincing threshold of § 2254(e)(1), it bolsters the

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[11] Transcriptions of Petitioner's interviews were not part of the record considered by the state supreme court, nor entered into evidence at the motions hearing or trial, except to the extend used to refresh witness recollections. Respondents note that, at trial, the prosecution offered only certain parts of the transcribed statements. Additional portions of the transcripts are attached as exhibits to Petitioner's Amended Petition. (See Dkt. 35, Exs. 1-3.) In light of the Court's determination that the full transcript does not support Petitioner's argument, it declines to further decide whether expansion of the record is necessary or warranted on this issue. See Rule 7, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

state supreme court's finding. It is clear from the exchange that Detective Millstone never promised Petitioner that his statements would not be used against him criminally, in fact the detective stated that he *would* relay any statements to the prosecutor and judge, to which Petitioner responded affirmatively. (Id.) Petitioner fails to overcome the factual finding that there was no promise of benefits or leniency.

Even assuming Detective Millstone's statement was a promise, the Arizona Supreme Court further found that Petitioner had not relied on the promise in making inculpatory statements. Specifically, the Court ruled: "Prior to Detective Millstone's interview, Lopez had told Detectives Miller and Salgado that he had struck the child. Accordingly, Lopez' admission occurred before the alleged inducement." Lopez, 174 Ariz. at 138, 847 P.2d at 1085. Petitioner argues that the Arizona Supreme Court's conclusion is erroneous because he made "a serious of hugely inculpatory and damaging statements" after Detective Millstone's alleged promise. (Dkt. 57 at 38.) The Court disagrees.

Detective Miller testified during cross-examination that Petitioner *twice* admitted hitting Anthony well before Detective Millstone's interview and the alleged promise. (R.T. 04/02/90 at 86-87.) More importantly, Petitioner's statements to Detective Millstone did not differ significantly from those to Detectives Miller and Salgado. Petitioner essentially offered the same version of events – that the nightstand caused Anthony's injuries. (R.T. 04/02/90 at 64-65, 102-03.) It is true that in his statement to Detective Millstone Petitioner acknowledged for the first time that the smack on Anthony's behind was hard and caused Anthony to cry. (R.T. 04/06/90 at 06.) Nonetheless, Petitioner

continued to maintain that the injuries wee caused by the falling nightstand (and lamp, fan and radio) and that he had never beat Anthony. (Id. at 60-63.)

In addition, Petitioner's subsequent statements to Detectives Miller and Godoy that he "killed" his child and should "rot in hell" were made in conjunction with Petitioner's continued claim that Anthony's injuries were caused by his negligence in leaving him alone in the room, not by any physical beating. (R.T. 04/02/90 at 91.) Based on this Court's review of the record, the Court finds that it was not "objectively unreasonable" for the Arizona Supreme Court to find that Petitioner did not rely on Detective Millstone's statement (even if it were deemed a "promise") when making inculpatory statements.

Petitioner has not demonstrated that the Arizona Supreme Court's conclusions that (1) Detectives Millstone did not make a promise, and (2) Petitioner did not rely on any promise in making inculpatory statements, are "unreasonable determinations of the facts" in light of the record. 28 U.S.C. § 2254(d)(2). Accordingly, Petitioner is not entitled to habeas relief on Claim 4.

Claim 7: Application of A.R.S. § 13-703(F)(6) Aggravating Circumstance

Petitioner contends that the state courts' application of the "especially heinous, cruel, or depraved" aggravating factor, under A.R.S. § 13-703(F)(6), was "arbitrary and capricious" in violation of the Eighth and Fourteenth Amendments, because it was "supported by no evidence whatsoever." (Dkt. 57 at 44-45.)

At sentencing, the trial court found that, beyond a reasonable doubt, Petitioner killed Anthony in an especially heinous, cruel or depraved manner. (R.T. 05/17/90 at 19.) The court explained its finding by stating:

> The victim, a child of 12 months and 9 days of age, was at the mercy of the defendant with no ability to protect or defend himself. His suffering was apparent or foreseeable, but defendant's selfish concern to shield himself from the consequences of his own actions caused him to deny the child any hope for life or the surcease of his pain through medical treatment. The Court finds that the cruelty and depravity of defendant's acts towards the innocent, helpless baby in his care far outweigh any evidence which might call for leniency.

(Id. at 19-20.)

On direct review, the Arizona Supreme Court similarly found the existence of the (F)(6) factor. Lopez, 174 Ariz. at 144, 847 P.2d at 1091. First, with respect to cruelty, the court stated:

> A murder is especially cruel if the victim consciously experienced physical or mental pain and suffering prior to dying. Amaya-Ruiz, 166 Ariz. at 177, 800 P.2d at 1285; State v. Fulminante, 161 Ariz. 237, 254, 778 P.2d 602, 609, (1988, cert. denied, 494 U.S. 1058, 110 S.Ct. 1528, 108 L.Ed.2d 768 (1990. A doctor who had reviewed the hospital records and the autopsy report testified as to the pain Anthony must have suffered from the numerous injuries inflicted on him. The doctor, board certified in pediatrics and in trauma and

emergency room medicine, had also spent four years in residency in child abuse. He testified that the skull fractures, especially the one where a piece of the child's skull was driven into his brain, would have caused Anthony "an excessive amount of pain." He stated that the abdominal injuries, the torn pancreas and bowel would have been very painful, "like somebody performing surgery without anesthesia." Anthony was conscious and felt this pain for at least 45 minutes before he slipped into a coma. Anthony must also have suffered some mental anguish while he remained conscious, knowing that one of the two people he depended on and trusted to care for and love him had beaten him repeatedly about the head and body and did nothing to stop the pain and comfort him. We believe the trial court correctly found that Lopez murdered Anthony in an especially cruel manner.

Lopez, 174 Ariz. at 143-44, 847 P.2d at 1090-91. Next, the court address heinousness and depravity, stating:

The other two factors, heinousness and depravity, focus on the murderer's state of mind at the time of the murder. Amaya-Ruiz, 166 Ariz. at 178, 800 P.2d at 1286; Fulminante, 161 Ariz. at 255, 778 P.2d at 620.

Five factors are looked at to determine whether a murderer acted in a heinous or depraved manner; (1) the murderer's relishing of the murder; (2) the infliction of gratuitous violence on the victim beyond that necessary to commit the murder; (3) the needless mutilation of the victim; (4) the

senselessness of the murder; and (5) the helplessness of the victim. State v. Gretzler, 135 Ariz. 42, 52, 659 P.2d 1, 11, cert. denied, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). Although the factors of senselessness and helplessness of the victim need not always, by themselves, justify a finding that the murder was heinous or depraved, they do inform the trial court of the defendant's mental state. Id. at 52-53, 659 P.2d at 11-12.

The murder of Anthony was senseless. Lopez admitted that after he had given Anthony a bath and was putting lotion on him, the infant "peed, so I smacked him." While such a reaction might be excused as a momentary flash of anger, the continued beating Anthony received, as evidenced by the extent of his injuries, bespeaks a "shockingly evil" mind and constitutes heinous conduct. Amaya-Ruiz, 166 Ariz. at 178, 800 P.2d at 1286. We can conceive of no act more senseless than beating a one-year-old child to death.

Anthony was clearly helpless and unable to defend himself from the blows inflicted by Lopez and unable to seek aid for his injuries. The one person who could have sought medical help for Anthony, Lopez, took pains to make it appear that an accident had occurred. In addition, when Anthony's mother returned to the apartment and wanted to take Anthony to the hospital, Lopez refused. While Lopez attempted to conceal the beating he had administered, Anthony lay on the couch in pain, suffering seizures, according to the medical testimony, as a result of the injures to his brain.

> According to the medical testimony, if Anthony had been brought to the hospital sooner, he might have lived. Lopez' decision to protect himself at the expense of the life of his one-year-old son is the essence of depravity.
>
> We believe the record amply supports a finding that Lopez was in a heinous and depraved state of mind when he beat Anthony. The trial court did not err in finding the aggravating circumstance that the murder was committed in an especially cruel, heinous, or depraved manner.

Id.

Federal habeas review of a state court's application of its own statutory aggravating circumstance "is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." Lewis v. Jeffers, 497 U.S. 764, 780 (1990). To assess the state court's finding that Anthony was killed in a "heinous, cruel or depraved" manner, the Court employs the "rational factfinder" test established in Jackson v. Virginia, 443 U.S. 307 (1979). Id. at 781. Applying the Jackson standard to the (F)(6) factor, the Supreme Court stated:

> A state court's finding of an aggravating circumstance in a particular case – including a *de novo* finding by an appellate court that a particular offense is "especially heinous . . .or depraved" – is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. at 783. In making such a determination, the Court is mindful of the deference owed to the state court's findings of fact and application of its own law, resolving all conflicts in the evidence in a manner that would support the aggravating circumstance. See id. at 780-83.

As the text of the statute reflects, the terms "heinous," "cruel" and "depraved" are stated in the disjunctive, and thus, "any one of them individually may constitute an aggravating circumstance." Lopez, 174 Ariz. at 143, 847 P.2d at 1090 (citations omitted).

A. Especially Cruel

Petitioner argues that, before finding cruelty pursuant to subsection (F)(6), the state was required to show that Anthony suffered pain beyond the norm of other first degree murders. (Dkt. 57 at 45.) Petitioner's argument is misplaced. The Arizona Supreme Court has never held that an (F)(6) cruelty finding is dependent on a comparative analysis of other cases. Rather, the court has repeatedly stated that the standard for determining if a murder is especially cruel hinges on the victim's consciousness of pain, see State v. Moody, 208 Ariz. 424, 471, 94 P.3d 1119, 1166 (2004); State v. Trostle, 191 Ariz. 4, 18, 951 P.2d 869 (1997); State v. Amaya-Ruiz, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990); the same standard that the court applied in this case.[12] Additionally, the U.S. Supreme

[12] The supreme court has noted that the (F)(6) cruelty finding is not intended to apply to all first degree murders, but only to murders in which the circumstances set it apart from the norm. The court further clarified that it is the

Court has held that Arizona's (F)(6) aggravating factor, as interpreted by the Arizona Supreme Court, adequately channels the sentencer's discretion as required by the Eighth and Fourteenth Amendments. Walton v. Arizona, 497 U.S. 639, 653-655 (1990), overruled on other grounds by, Ring v. Arizona, 536 U.S. 584 U.S. 584 (2002); Lewis, 497 U.S. at 777-78.

The trial record reflects that there was a gap of at least three hours between the time Petitioner severely beat Anthony and when the child was finally taken to the emergency room. (R.T. 04/05/90 at 108, 122.) When Anthony arrived at the hospital, the baby was unresponsive and doctors found that considerable bleeding had occurred in his abdomen. (Id. at 108, 111.) Dr. Hoebeich, who reviewed the hospital and autopsy records, testified at the presentence hearing about the pain Anthony must have suffered during the three-hour period between being beaten and his death. (R.T.05/10/90 at 136.) Dr. Hoebeich testified that the skull fractures Petitioner inflicted on Anthony, especially the one which drove a piece of the baby's skull into his brain, would have caused "an excessive amount of pain." (Id. at 124.) He also testified that the torn pancreas and bowel in the abdomen would have felt "like somebody performing surgery without anesthesia." (Id. at 129.) Based on his experience and assessment of the severe injuries Anthony endured, Dr. Hobeich testified that the baby was conscious and felt pain for *at least* 45 minutes prior to his death. (Id. at 136.) It is clear from this

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definition of cruelty itself – requiring the victim's consciousness of pain – that sets a crime apart from the norm. See State v. Gretzler, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983).

evidence that a rational factfinder could conclude that Anthony experienced a prolonged and painful death; thus, the state court's finding of cruelty was not arbitrary and capricious. See Lewis, 497 U.S. at 783.

B. Especially Heinous or Depraved

The evidence of cruelty, by itself, is sufficient to have supported the state court's finding of the subsection (F)(6) aggravating circumstance; however, the state supreme court also found that the Petitioner's murder of Anthony was heinous and depraved. Lopez, 174 Ariz. at 144, 847 P.2d 1091.

First, one-year-old Anthony was unquestionably helpless against his murderer. (R.T. 04/05/90 at 121.) Second, based on the medical examiner's detailed testimony of the extensive injuries Anthony endured, coupled with Petitioner's admission to striking Anthony because he "peed, so I smacked him," it is clear that the murder was senseless. (R.T. 04/06/90 at 74-113, 60.) Third, the evidence establishes that Petitioner chose to conceal his wrongdoing for hours, as Anthony lay dying, denying the baby necessary medical treatment. The evidence certainly supports the supreme court's finding that the murder was senseless, with the court reasoning that, "[w]e can conceive of no act more senseless than beating a one-year-old child to death." See Lopez, 174 Ariz. at 144, 847 P.2d at 1091.

Petitioner argues that findings of helplessness and senselessness are not enough, in isolation, to support a finding of heinousness and depravity under subsection (F)(6). (Dkt. 57 at 47.) However, the Arizona Supreme Court's interpretation of the state law on this point belies

Petitioner's argument. The court stated that, "[a]lthough the factors of senselessness and helplessness of the victim *need not always*, by themselves, justify a finding that the murder was heinous or depraved, they do inform the trial court of the defendant's mental state." Lopez, 174 Ariz. at 144, 847 P.2d at 1091. Implicit in the court's reasoning is that, in some cases, the factors of senselessness and helplessness *can*, by themselves, justify a finding of heinousness or depravity under subsection (F)(6). See id. (emphasis added); State v. King, 180 Ariz. 268, 286, 883 P.2d 1024, 1042 (1994) (noting that senselessness of crime and helplessness of victim, together or separately, when considered with other circumstances, may lead to conclusion that offense was heinous or depraved.) The evidence establishes that Petitioner's brutal acts toward Anthony, as well as his denial of possible life-saving treatment to the child for over three hours, support the state court's finding that Petitioner committed the murder with a heinous and depraved state of mind.

There is extensive evidence in the record from which a rational sentencer could conclude that Petitioner's murder of Anthony was cruel, heinous and depraved. Accordingly, the state court's finding is not arbitrary and capricious such that no reasonable sentencer could have so concluded. See Lewis, 497 U.S. at 783. Therefore, Petitioner is not entitled to habeas relief on Claim 7.[13]

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[13] The Ninth Circuit has not decided whether sufficiency of the evidence claims are due additional deference pursuant to the AEDPA, or should be analyzed strictly under Jackson. See Bruce v. Terhune, 376 F. 3d 950, 956-57 (9th Cir. 2004). Because this claim fails under a strict Jackson analysis, the Court need not resolve that question.

Claims 12-F, H and K: Ineffective Assistance of Counsel

Petitioner alleges that counsel was ineffective for: (1) failing to move to preclude prior instances of abuse suffered by Anthony (Claim 12-F); (2) failing to object to a replica of Petitioner's bedroom in the center of the courtroom (Claim 12-H); and (3) failing to raise certain claims on appeal (claim 12-K).

On July 6, 1994, Petitioner filed a first petition for post-conviction relief ("PCR") in state court, alleging ineffective assistance of counsel.[14] The trial court held an evidentiary hearing on May 2-3, 1995, June 13, 1995, and September 25, 1995, on January 19, 1996, after making findings of fact and applying the standard set forth in Strickland v. Washington, the trial judge denied relief. (Post Conviction Record, Record on Appeal at 461.)[15] In December 1996, the Arizona Supreme Court summarily denied review. Accordingly, the Court reviews the trial court's ruling, pursuant to the deferential standard established by 28 U.S.C. § 2254(d)(1), as the "last

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[14] While his First Amended Petition was pending in this Court, Petitioner filed a second petition for state post-conviction relief in July 2002, raising four constitutional claims. The trial court denied relief on April 28, 2003, and denied a motion for rehearing on June 9, 2003. On May 25, 2004, the Arizona Supreme Court summarily denied a petition for review. Discussed further, infra pp. 32-39.

[15] Hereinafter referred to as "P.C.R., R.O.A." The PCR record is part of the state court record received by the Court on June 16, 1997, supra note 6. (See Dkt. 20.)

reasoned" state decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

To prevail on a claim of ineffective assistance of counsel ("IAC"), Petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To show deficient performance, a petitioner must produce evidence that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. The performance inquiry is whether counsel's assistance was reasonable considering the totality of the circumstances. Id. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Id. To demonstrate that counsel's deficient performance resulted in actual prejudice to a petitioner's case, he must prove that "counsel's errors were so serious as to deprive the defendant of a fair trial." Id. at 687.

A. Claim 12-F

Petitioner alleges that lead trial counsel, Sean Bruner, was ineffective for failing to object at trial and sentencing to evidence from Dr. Henry that Anthony suffered prior abuse. (Dkt. 57 at 51-56.) The testimony in question concerned various injuries that may have occurred prior to the fatal injuries, including that three of Anthony's ribs had been broken in the past and were healing at the

time of this death. (R.T. 04/06/90 at 104-06.) There was no evidence introduced tying Petitioner to the prior injuries. (P.C.R., R.O.A. at 450.)

At the first PCR evidentiary hearing, Bruner testified that he was aware of the prior injuries inflicted on Anthony from the police reports, had an independent expert review the autopsy report and investigated whether other persons, such as Anthony's mother, could have caused the injuries. (R.T. 05/03/95 at 80-81, 113; R.T. 05/02/95, P.M. Transcript, at 26.)[16] Bruner also testified that he did not consider the prior injury evidence to be improper character evidence under Rule 404(b) of the Arizona Rules of Evidence because he believed it was merely a part of the evidence regarding the state of the body as it was found by the medical examiner. (R.T. 05/03/95 at 79.)

In assessing the claim under Strickland, the trial court stated:

> Mr. Bruner did not object to the admission of Dr. Henry's testimony about injuries inflicted on Anthony days prior to the fatal beating.
>
> Mr. Bruner is an experienced trial attorney, having represented defendants in at least 25 jury trials and more than one capital case. [citation omitted.]

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[16] The morning and afternoon sessions of the May 2, 1995 PCR hearing were reported by two different court reporters and, therefore, citations from that date of testimony are referred to herein as either the "A.M." or "P.M." transcript.

Mr. Bruner is currently on the appointment list for homicide and capital cases in Pima County. [citation omitted.]

Mr. Bruner was aware from the police reports of the prior injuries inflicted on Anthony and had an independent expert review the report of Anthony's autopsy. [citation omitted.]

Mr. Bruner investigated whether other persons could have caused the prior injuries, and he presented no evidence that anyone else could have caused those injuries. [citation omitted.]

The evidence of the prior injuries was part of the evidence about the state of the body at the time of death. [citation omitted.]

Evidence of Mr. Lopez's guilt includes but is not limited to the following: (1) Anthony's most recent injuries were not consistent with Mr. Lopez's explanation; (2) Mr. Lopez gave inconsistent statements regarding the cause of Anthony's death; (3) Mr. Lopez did not immediately take Anthony to the hospital and refused to take him to the hospital several times; (4) Mr. Lopez admitted that he had hit Anthony on the date in question.

Therefore, Mr. Bruner's decision not to object to the admission of the prior injury evidence did not fall below an objective standard of reasonableness. Strickland at 688.

> Even if the evidence of prior injuries was not admissible, no reasonable probability existed that the outcome of Mr. Lopez's trial would have been different because there was sufficient evidence to establish his guilt absent the evidence of prior injuries. Id. at 694.

(P.C.R., R.O.A. at 450.)

The trial court correctly identified Strickland as the governing Supreme Court precedent to be applied to Petitioner's claim, and then applied it to the evidence in the record. The record clearly supports the trial court's findings and conclusions. Bruner's decision not to object to the evidence did not violate the reasonableness standard of Strickland nor result in prejudice.[17] Thus, the trial court's

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[17] As Respondents point out, a review of the Arizona Rules of Evidence reveals that Bruner's conclusion that the prior injury evidence was not Rule 404(b) evidence was likely correct and, at the very least, was reasonable under the circumstances. Rule 404(b) only precludes other act evidence admitted "to prove the character of a person in order to show action in conformity therewith." Rule 404(b), Ariz. R. Evid. Such evidence may be admitted, however, for some other relevant purpose. Id. The injuries to Anthony's body at the time of his death were "inextricably intertwined" with the evidence of the corpus delicti of the crime. See State v. Dickens, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996); State v. Hernandez, 167 Ariz. 236, 805, P.2d 1057, 1059-1060 (Ariz. App. 1990) (evidence of battered child syndrome evidence does not prove a particular person has done anything, only that injuries were not caused by accidental means.)

ruling denying Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254 (d)(1). Petitioner is not entitled to habeas relief on Claim 12-F.

B. Claim 12-H

Petitioner alleges that trial counsel was ineffective for failing to object to the continued presence of a replica of the bedroom where Anthony sustained his fatal injures, which was assembled in the courtroom during most of the trial. (Dkt. 57 at 451.) While Petitioner concedes the replica had some probative value (id. at 57), he contends that the replica should have been removed once testimony relating to it concluded.

At the first PCR hearing, Jacqueline Marshall,[18] who worked as co-counsel with Bruner, testified that prior to trial defense counsel met with the prosecutor, viewed the replica, and made an arrangement not to object to its use. (R.T. 05/03/95 at 117-18.) Marshall testified that the replica was not taken in and out of the courtroom during trial due to its cumbersome size and structure. (R.T. 05/03/95 at 116.)

In its findings, the trial court stated that Petitioner's trial took place in another judge's courtroom, to provide adequate room for the large bedroom replica. (P.C.R., R.O.A. at 451.) Given the large size of the replica, it is clear to the Court that Petitioner's position, that the replica

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[18] The Court notes that Jacqueline Marshall currently sits as a U.S. Magistrate Judge for the District of Arizona.

be disassembled and reassembled during the trial, is untenable. Such an onerous task during the trial could have itself become a distraction to jurors. Accordingly, as the trial court concluded, "Mr. Bruner's decision not to object to the replica was a reasonable tactical choice." (P.C.R., R.O.A. at 452.)

Moreover, the Court disagrees with Petitioner's contention that the replica was a "powerful magnet," pulling the jurors to arrive at a guilty verdict. The replica was simply a model of Petitioner's bedroom and its contents as they were positioned on the day of Anthony's death. Given the myriad of explanations Petitioner gave regarding how Anthony was injured, the physical space and contents of the bedroom where the injuries took place was particularly relevant to *both* parties. In fact, as Respondents point out, the bedroom replica was, per se, a neutral piece of evidence. The replica was unlike, for example, a bloody murder weapon in the constant view on the jurors. As stated by the trial judge, who was present in the courtroom throughout the trial and saw first-hand how the replica was used, "[t]he replica did not create a circus atmosphere in the courtroom. There is nothing in the record to indicate that the trial atmosphere was inappropriate at any time." (P.C.R., R.O.A. at 451.)

Based on the pre-trial arrangement of counsel, the size of the replica, and the replica's neutrality, the Court agrees with the trial court that Bruner made a tactical decision not to object to the replica. (P.C.R., R.O.A. at 452.) Accordingly, the trial court's ruling denying Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of clearly established

federal law. See 28 U.S.C. § 2254(d)(1). Therefore, Petitioner is not entitled to habeas relief on Claim 12-H.[19]

C. Claim 12-K

The Court found exhausted Petitioner's claim that appellate counsel, Harriette Levitt, was ineffective for failing to raise on appeal, as claims of fundamental error, the following issues: (1) admissibility or prior injuries; (2) use of the bedroom replica; (3) timing of the prosecutor's election of felony murder; (4) jury instructions that were or were not presented; and (5) prosecutorial misconduct in opening and closing argument. (Dkt. 54 and 26.)

Because Petitioner fails to establish that he is entitled to relief on Claims 12-F and 12-H, he cannot establish the prejudice necessary for an ineffective assistance of appellate counsel claim for failure to raise those issues. Therefore, Petitioner is not entitled to relief on the subparts of Claim 12-K that correspond to Claims 12-F and 12-H, namely subparts (1) and (2).

Petitioner presents no argument whatsoever as to subparts (3), (4), and (5) of Claim 12-K. Additionally, the merits brief states that "Petitioner's counsel does not view any of those claims [regarding appellate counsel] as

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[19] In his merits brief, Petitioner alleges that the cumulative effect of trial counsel's errors is grounds for a finding of ineffective assistance of counsel, even if neither of the two exhausted errors alleged, individually, warrant habeas relief. (Dkt. 57 at 59.) However, the Court previously found Petitioner's cumulative-error claim, Claim 12-J, procedurally barred. (Dkt. 53 at 26.)

meritorious except to the extent" they allege appellate counsel should have raised Claims 12-F and 12-H, subparts (1) and (2) of Claim 12-K. (See Dkt. 57 at 51.) The Court agrees that Claim 12-K subparts (3), (4), and (5) are without merit.

Because the issues underlying subparts (3), (4) and (5) were not preserved in the trial court, Petitioner's appellate counsel Levitt could only have raised these issues on appeal under a fundamental error standard of review. On direct appeal, the Arizona Supreme Court conducted an independent review of the record for fundamental error in this case. Lopez, 147 Ariz. at 145, 847 P.2d at 1092. The court stated: "[w]e have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 18 L.Ed.2d 493 (1967), and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), and have found none." Id.

In the first PCR ruling, the trial court indicated that it could not resolve Petitioner's claims of ineffective assistance of appellate counsel because Petitioner did not present the testimony of Levitt to ascertain the reasons for her actions or inactions on appeal. (P.C.R., R.O.A. at 460.) Notwithstanding this, the trial court concluded that Levitt "was not ineffective as appellate counsel because based on this Court's findings and conclusions, Mr. Bruner was effective as trial counsel and errors he made were not fundamental." (Id.) The trial court further stated that "[w]ithout the necessary testimony, Mr. Lopez has failed to prove that Ms. Levitt was ineffective." (Id.)

Petitioner has not presented any evidence or argument in support of his allegation that appellate counsel

was ineffective for failing to raise subparts (3), (4), and (5). Petitioner fails to satisfy his burden to show deficient performance by counsel and prejudice to his case. Thus, the state court's decision was neither contrary to nor an unreasonable application of Strickland, see 466 U.S. at 687-688, and Petitioner is not entitled to relief on Claim 12-K.

MOTION TO AMEND

While this matter was under advisement, Petitioner filed a motion to amend his first amended petition to raise four additional claims. (Dkt. 71.) Unbeknownst to this Court, Petitioner apparently raised these claims in a second petition for state post-conviction relief, which was filed in July 2002. The PCR court denied relief on April 28, 2003, and denied a motion for rehearing on June 9, 2003. On May 25, 2004, the Arizona Supreme Court summarily denied a petition for review. (Dkt. 72, Ex. 1.) Petitioner filed a petition for writ of certiorari with the United States Supreme Court regarding Proposed Claim XV (Enmund-Tison issue), which was denied on November 1, 2004. (Dkt. 73, Ex. K.)

A petition for habeas corpus may be amended pursuant to the Federal Rules of Civil Procedure. 28 U.S.C. § 2242; see also Rule 11, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (providing that the Federal Rules of Civil Procedure may be applied to habeas petitions to the extent the rules are not inconsistent with the habeas rules). Thus, the Court looks to Rule 15 of the Federal Rules of Civil Procedure to address a party's motion to amend a pleading in a habeas corpus action. See Calderon v. United States Dist. Ct. for the N. Dist. Of Cal., 134 F.3d

981, 986 n.6 (9th Cir. 1998) (citing Withrow v. Williams, 507 U.s. 680, 696 n.7 (1993)).

Leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), and courts must review motions to amend in light of the strong policy permitting amendment. Gabrielson v. Montgomery Ward & Co., 785, F. 2d 762, 765 (9th Cir. 1986). However, it is within the discretion of the Court whether to allow amendment in a particular case. See Foman v. Davis, 371 U.S. 178, 182 (1962). The factors which may justify denying a motion to amend are undue delay bad faith or dilatory motive, futility of amendment, and undue prejudice to the opposing party. Id.

Petitioner seeks to amend his petition for habeas relief to add the following claims:

> **Proposed Claim 13:** The trial court violated Petitioner's right to a trial by jury when it alone found the presence of aggravating factors in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments for the United States Constitution.
>
> **Proposed Claim 14:** Petitioner was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when his trial counsel failed to acquire significant scientific testimony which would have rebutted the State's most influential evidence in aggravation and which would have substantially weakened the State's guilt/innocence case.

Proposed Claim 15: The trial court sentenced Petitioner to death in the absence of finding that he killed, attempted to kill or intended to kill and thereby violated the Eighth Amendment to the United States Constitution.

Proposed Claim 16: The execution of Petitioner would violate the Eighth Amendment prohibition against cruel and unusual punishment as the Petitioner suffers from brain damage which substantially diminished his culpability for the crime.

(Lodged Second Amended Petition at 12-13.) Respondents oppose Petitioners motion on the grounds of futility, undue delay, and prejudice. (Dkt. 73 at 5.)

A. Futility

To assess futility, a court necessarily evaluates whether relief may be available on the merits of proposed claims. See Caswell v. Calderon, 363, F.3d 832, 837-39 (9th Cir. 2004) (conducting a two-part futility analysis reviewing both exhaustion of state court remedies and the merits of the proposed claim.) Amendment of a habeas petition may be denied as futile if it is apparent that the petitioner would not be entitled to relief for any reason, including failure to exhaust, procedural default, or on the merits. "Futility of amendment can, by itself, justify the denial of a motion to amend." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Respondents argue that amendment here is futile because each of the four proposed claims are either procedurally defaulted or without merit. (Dkt. 73 at 7.) the Court agrees.

Proposed Claim 13 alleges that Petitioner was denied his right to a jury trial on all of the elements of capital murder, specifically the determination of aggravating factors and imposition of a death sentence, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.[20] This claim is based on the Supreme Court's ruling in Ring v. Arizona, which found that Arizona's aggravating factors are an element of capital murder and must be found by a jury. 536 U.S. at 609. However, Petitioner correctly acknowledges that the Supreme Court's recent holding in Summerlin v. Schriro, 124 S. Ct. 2519 (2004), is controlling precedent with respect to his Ring claim. (Memorandum in Support of Lodged Second Amended Petition at 144, 147.) Summerlin holds that the dictates of Ring do not apply retroactively to cases already final on direct review. 124 S. Ct. at 2525. Because Petitioner's direct review was final prior to Ring, he is not entitled to relief premised on that ruling.

In his Reply to Respondents' Opposition, Petitioner argues that the Court should allow amendment to add Proposed Claim 13 because there have been several Supreme Court rulings in recent years interpreting the Sixth Amendment. (Dkt. 76 at 7-8.) Petitioner asserts that Proposed Claim 13 cannot be futile because Sixth Amendment jurisprudence is "volatile" and the case law is not "in any way permanent and unchangeable." (Id. at 8.) This argument is nonsensical. Supreme Court precedent, as it currently stands, cannot be ignored on the grounds that it

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[20] In his second petition for post-conviction relief in state court, Petitioner premised Proposed Claim 13 only upon his Sixth Amendment right to a jury in the penalty phase of his case.

might someday be altered or even reversed. See Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001). Supreme Court precedent is not merely evidence of what the law is, but rather, it *is* the law. Id. Therefore, amendment to add Proposed Claim 13 would be futile and is denied. See Bonin, 59 F.3d at 845.

Proposed Claim 14 asserts ineffective assistance of counsel for failing to rebut expert testimony at the aggravation hearing regarding the victim's pain and suffering. The PCR court found the claim precluded based on Arizona Rule of Criminal Procedure 32.2(a)(3) for failure to raise it in Petitioner's first PCR petition.[21] Claims that were fairly presented in state court but found defaulted on state procedural grounds will be procedurally defaulted in federal court if the state procedural bar was independent of federal law and adequate to warrant preclusion of federal review. See Harris v. Reed, 489 U.S. 255, 262 (1989). Arizona Rule of Criminal Procedure 32.2(a)(3) is independent of federal law, Stewart v. Smith, 526 U.S. 856, 861 (2002), and the Ninth Circuit has repeatedly determined that Arizona regularly and consistently applies its procedural default rules such that they are an adequate bar that precludes federal review of a claim. See Ortiz v. Stewart, 149 F.3d 923, 931-32 (9th Cir. 1998) (held Arizona procedural default rules "adequate"); Poland v. Stewart, 117

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[21] The PCR court's ruling states that these claims are precluded based on Arizona Rule of Criminal "32.1(a)(3)," which rule does not exist. It is apparent that the citation is an unintended typographical error, and, as Petitioner acknowledges (dkt. 76 at 8 n.4), it appears the court meant to cite 32.2(a)(3).

F.3d 1094, 1106 (9th Cir. 1997)(same); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir. 1996) (same).

In his Reply, Petitioner asserts that amendment to add Proposed Claim 14 should be allowed because the state court did not specifically address his argument based upon Arizona Rule of Criminal Procedure 32.1(h) in its PCR ruling. (Dkt. 76 at 9.) Petitioner states that Rule 32.1(h), which provides a ground for post-conviction relief if a defendant can demonstrate by clear and convincing evidence that he would not have been sentenced to death, was not enacted until December 1, 2000, which was after his first PCR petition was litigated. Petitioner claims that because this ground for relief did not exist at the time of his first PCR, the basis for Proposed Claim 14 cannot be subject to preclusion under Rule 32.2(a)(3). The Court disagrees. Although the state court did not specifically mention Rule 32.1(h) in the second PCR ruling, it nonetheless found Proposed Claim 14 precluded under Rule 32.2(a)(3). Thus, the court must have necessarily concluded that the claim failed to constitute an exception to Rule 32.2(a) preclusion as set forth in Rule 32.2(b). This Court presumes that the state court knows the law and applied it in making its decision. See Walton, 497 U.S. at 653. Moreover, Petitioner has not set forth any reason why, during his first PCR proceeding, he was unable to obtain the expert evidence he now proffers.

The Court finds that Proposed Claim 14 is procedurally defaulted and barred form review in this Court, absent a showing of legitimate cause for the failure to properly exhaust in state court and prejudice arising from the alleged constitutional violation, or that a fundamental miscarriage of justice would result if the claim were not

heard on the merits in federal court. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). In their response to the motion to amend, Respondents argued that adding Claim 14 to the petition would be futile because it is procedurally barred. Thus, Petitioner was on notice that a procedural bar might render the requested amendment futile. Nevertheless, in reply, Petitioner failed to allege, much less establish, either cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default of this claim. Because Petitioner cannot overcome the default, the Court finds that amendment would be a waste of the parties' and the Court's time and resources and is, therefore, futile. See Perry v. Norris, 107 F.3d 665, 667 (8th Cir. 1997) (holding that when there is no procedural gateway available for hearing an otherwise barred claim, amendment is properly denied as futile).

Proposed Claim 15 alleges error under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). Like Proposed Claim 14, the state court held the claim precluded based on Arizona Rule of Criminal Procedure 32.2(a)(3). However, Petitioner's Proposed Claim 15 is *already* part of his petition as Claim 3, the merits of which were addressed by the Court in its December 1999 Order. (Dkts. 35, 53.) Because Proposed Claim 15 is duplicative of Claim 3, amendment to add a second, nearly identical version of the claim would be futile and is denied.

Finally, Petitioner seeks to add Proposed Claim 16, which alleges that his execution would violate the Eighth Amendment's prohibition again cruel and unusual punishment because he suffers from brain damage that substantially diminished his culpability for the crime.

Petitioner's argument is premised upon the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002), which held it unconstitutional to execute the mentally retarded. (Memorandum in Support of Lodged Second Amended Petition at 171-73.) Although he concedes that he is not mentally retarded (id. at 176), Petitioner supports his argument that Atkins is applicable to him with two affidavits from mental health professionals that state he possibly suffers from brain damage.[22] The cited affidavits indicate that Petitioner's mother may not have abstained from alcohol during pregnancy and that, during his adolescence and early adulthood, Petitioner suffered four serious head injuries. Based on this, Petitioner contends that his alleged brain impairment "implicates most of the same policy concerns implicated by the Supreme Court in Atkins." (Dkt. 71 at 176.)

Under § 2254(d)(1), habeas relief may be granted only when a state court's ruling "resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d). "Clearly established" federal law includes the holdings, as opposed to dicta, of the Supreme Court at the time the petitioner's state court conviction became final. See Williams v. Taylor, 529 U.S. at 365 (2000). Because the holding in Atkins applies only to the mentally retarded, which Petitioner concedes he is not, that decision is inapplicable here. See 536 U.S. at 318.

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[22] The affidavits of Claire O'Dowd, M.S.W., and Dr. Thomas C. Thompson, are attached to Petitioner's petition for review to the Arizona Supreme Court as Exhibits 4 and 5. (See Dkt. 72 at Ex. 1.)

Notwithstanding this, Petitioner attempts to posture his brain impairment claim under Atkins by relying on the Supreme Court's recent decision in Roper v. Simmons, 125 S. Ct. 1183 (2005), which held it unconstitutional to execute a person who was a juvenile at the time of the capital offense. Although Petitioner was not a juvenile at the time of the crime in this case, he argues, by analogy, that Roper signals for a more broad application of Atkins. Essentially, Petitioner requests that the Court extend the Atkins ruling to include a prohibition against executing those with brain impairments (but not so severe as to constitute mental incompetency under Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The court declines to do so.

Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue.[23] See Williams, 529 U.S. at 381. Therefore, neither Atkins nor Roper are applicable to Petitioner's claim. Because the merits of Petitioner's claim are not squarely governed by clearly established Supreme Court law for purposes of § 2254(d)(1), if fails as a matter of law and amendment to add this claim would be futile.

Moreover, the record simply does not support Petitioner's contention that he suffers from a legally significant brain impairment. The first of the affidavits

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[23] The Supreme Court recently added that, "[s]ection 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 2151 (2004)

Petitioner relies upon points to the opposite conclusion. Mitigation specialist O'Dowd states that:

> [Petitioner] had an excellent work history. He had been continuously employed throughout nearly all of his adult life. He was honorably discharged from both the U.S. Army and the National Guard. He also obtained specialty training and employment in heating/cooling and refrigeration. He worked for the City of Tucson from 1977 to 1987. At the time of the incident, he was employed as a safety technician/flag man at Cyprus Mine. He had been working everyday for at least a month, with shifts lasting up to 12 hours.

(Dkt. 72, Ex. 1 at Ex. 4.) The second affidavit concludes only that Petitioner is a "candidate for organic brain damage" based on counsel's representations. (Dkt. 72, Ex. 1 at Ex. 5.) the affiant, Dr. Thompson, never interviewed Petitioner nor reviewed anything about is medical, family, or educational background in making this assessment. (Id.)

Further, to the extent Proposed Claim 16 alleges ineffective assistance of counsel, the state court found it precluded under Rule 32.2(a)(3). (Dkt. 72, Ex. 1 at Ex. 1.) Therefore, it is procedurally defaulted and barred from review in this Court, absent a showing of legitimate cause for the failure to properly exhaust in the state court and prejudice from the alleged constitutional violation, or that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. See Coleman v. Thompson, 501 U.S. at 735 n.1. Despite having the opportunity, Petitioner has failed to allege either exception to overcome the default. Accordingly, the Court finds amendment to add Claim 16 would be futile and is denied.

B. Undue Delay/Prejudice

This case has been pending since 1997, and briefing on the merits of Petitioner's claims was completed in 2000. The case was reassigned to the undersigned judge just this year. (Dkt. 68.) At no point during this extensive period did Petitioner notify or seek leave from the Court to stay these proceedings in order to exhaust new claims in state court.

Further, the basis for each of the four proposed claims was available at the time Petitioner filed his initial petition; none allege facts not known to Petitioner in 1997. Specifically, the basis of Proposed Claim 14 (ineffective assistance of counsel) includes an expert affidavit that was executed in 1997. Similarly, both affidavits relied upon as support for Proposed 16 (possible brain damage) were executed in 1997. Rather than asserting newly discovered facts, Petitioner simply reconstitutes known facts to create new theories for habeas relief. See Bonin, 59 F.3d at 845, citing Allen v. City of Beverly Hills, 911 F.2d 367, 374 (9th Cir. 1990) (denying motion to amend where movant presented no new facts but only new theories and provided no satisfactory explanation for failure to fully develop contentions originally). When coupled with Respondents' interest in finality of judgment, the Court finds that amendment at this stage would prejudice Respondents and unduly delay these proceedings. Therefore, leave to amend is denied.

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court

further finds that an evidentiary hearing in this matter is neither warranted nor required. Finally, the Court declines to allow amendment to add, at this late juncture, procedurally defaulted and meritless claims.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 35) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that Petitioner's Motion for Leave to File First Set of amendments to First Amended Petition for Writ of Habeas Corpus (Dkt. 71) is **DENIED**.

IT IS FURTHER ORDERED that any motion for reconsideration of this matter comply with the page-limits set forth in Local Rule 7.2(e) and be filed no later than July 15, 2005.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on March 18, 1997 is **VACATED**.

IT IS FURTHER ORDERED that the Clerk of Court send a coy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona 85007-3329.

DATED this 28th day of June, 2005.

CINDY K. JORGENSON
United States District Judge

EXHIBIT D

12/3/99

DEC 3 1999
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA ATTORNEY GENERAL'S OFFICE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ATTORNEY GENERAL'S OFFICE

GEORGE MOLINA LOPEZ, 224- TUC-WDB	)	No. CIV 97-
Petitioner,	)	
	)	MEMORANDUM OF
	)	DECISION AND ORDER
vs.	)	
	)	
TERRY L. STEWART, et al.,	)	
Respondents	)	
	)	

Petitioner George Molina Lopez ("Petitioner") filed in a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Amended Petition presents twelve claims. This Order addresses procedure bar and other issues raised by Respondents' answer to the Petition. For the reasons set forth herein, the Court finds that Claims 1(in part), 5,6, 8-11, 12-A thru E, 12-G, 12-I, and 12-J are procedurally barred. Claims 1 (in part), 2, 4, 7, 12-F, 12-H, and 12-K will be decided on the merits in a separate order. The Court further finds that Claim 3 is meritless.

BACKGROUND

On April 10, 1990, a jury convicted Petitioner of child abuse and first degree murder in the death of his one-year-old son, Anthony. The trial judge sentenced him to death. On direct appeal, the Arizona Supreme Court affirmed. See State v. Lopez, 174 Ariz. 131, 847 P.2d 1078 (1992), cert. denied 510 U.S. 894, 114 S.Ct. 258 (1993).

Petitioner filed a petition for post-conviction relief in state court on July 6, 1994. An evidentiary hearing was held on May 2, 1995, and on January 19, 1996, the trial judge denied relief.

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In December 1996, the Arizona Supreme Court denied review.

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on March 17, 1997, and an Amended Petition raising twelve claims on November 21, 1997. Respondents filed an Answer, limited to issues of exhaustion and procedural default. Petitioner filed a Traverse, Respondents filed a Reply, and Petitioner filed a Sur-Reply.

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v.

Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. See Castille v. Peoples, 489 U.S. 346, 351, 109 S.Ct. 1056,1060 (1989).

A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which his claim is based. Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982); Picard v. Connor, 404 U.S. 270, 277-78, 98 S.Ct. 509, 513 (1971) [1] In state court, the petitioner must describe not only the operative facts but also the asserted constitutional principle. The United States Supreme Court has stated:

If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 888 (1995). Similarly, a claim may be considered unexhausted if it includes new factual allegations not presented to the state court which fundamentally alter the legal claim already considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 260, 106 S.Ct 617, 621-22 (1986).

[1] Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley , 69 F.3d 247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

Generally, there are two methods by which a petitioner may satisfy the exhaustion requirement. First, he may "actually" exhaust his claims by providing the state court with an opportunity to review the facts and legal theories in a procedurally appropriate manner. Second, he may "technically" exhaust his claims by showing either that a state court found his claims defaulted on procedural grounds or, if he never presented his claims in any forum, that no state remedies remain available to him. See Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S.Ct. 1558, 1570 n.28 (1928)). "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him." Coleman, 501 U.S. at 732, 111 S.Ct. at 2555. IF a claim has never been presented to the state court, a federal habeas court may determine whether state remedies remain available. See Harris v. Reed, 489 U.S. 255, 269-70, 109 S. Ct. 1038, 1047 (1989) (O'Connor, J., concurring); Teage v. Lane, 489 U.S. 288, 298-99, 109 S.Ct. 1060, 1069 (1989); see also White v. Lewis, 874 F.2d 599, 602 (9th Cir. 1989).

Arizona Rule of Criminal Procedure 32 governs when petitioners may seek relief in post-conviction proceedings and raise federal constitutional challenges to their convictions or sentences in state court. Rule 32.2 provides, in part:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
>
> ...
>
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
>
> (3) *That has been waived at trial, on appeal, or in any previous collateral proceeding.*
>
> b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), and (g). When a claim under [these subsections] is raised in a successive or untimely petition, the petition must set forth the reasons for not raising the claim in the previous petition or in a timely manner. If meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the petition shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (as amended nunc pro tunc Sept. 24, 1992) (emphasis added). Thus, pursuant to Rule 32.2, petitioners may not be granted relief on any claim which could have been raised in a prior Rule 32 petition for post-conviction relief. Only if a claim falls within certain exceptions (sub-

sections (d) through (g) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition will the preclusive effect of Rule 32.2 be avoided.

Therefore, in the present case, if there are claims which have not been raised previously in state court, the Court must determine whether Petitioner has state remedies currently available to him pursuant to Rule 32. If there are non, he has "technically" exhausted the claims. However, the Court may not review the claims on the merits unless Petitioner demonstrates legitimate cause and actual prejudice to excuse his failure to properly raise the claims earlier, or shows that a fundamental miscarriage of justice would result. Coleman, 501 U.S. at 735 n.1, 111 S.Ct. at 2557 n.1; Engle, 456 U.S. at 129, 102 S.Ct at 1572. Similarly, if a claim was raised in state court but found precluded or waived, the federal court will not hear the claim absent a showing of cause and prejudice or fundamental miscarriage of justice. [2]

Ordinarily, "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753, 111 S.Ct. 2546, 2566 (1991). Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct 2639, 2645 (1986). "Prejudice" is actual harm resulting from the alleged constitutional error. Magby v. Wawrzaszek, 741 F.2d 240,

244 (9th Cir. 1984). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they

[2] However, a federal court will not require a habeas petitioner to demonstrate cause and prejudice unless the procedural default is independent of the federal claim and is adequate to warrant withdrawal of federal relief. See Harris, 489 U.S. at 262, 109 S.Ct. at 1043. A procedural default is not independent if, for example, the state courts themselves bypass the petitioner's default and consider his claims on the merits. Id. When a federal court determines that a procedural default either is not independent of federal law or is inadequate to warrant denial of federal life, the petitioner's failure to comply with state procedures will be excused notwithstanding his failure to demonstrate cause and prejudice; in such case, the court may entertain the habeas petition. Id.

worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension. United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982).

If a petitioner cannot meet the cause and prejudice standard, the Court still may hear the merits of procedurally barred claims if the failure to hear the claims would constitute a "fundamental miscarriage of justice". Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992). The "fundamental miscarriage of justice" exception is also known as the

"actual innocence" exception. There are two types of claims recognized under this exception: (1) that a petitioner is "innocent of the death sentence, " or, in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable fact finder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. At 336, 112 S.Ct. at 2517. In the second instance, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995). To establish the requisite probability, the petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. Furthermore:

[A]substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare... To be credible, such a claim requires petitioner to support his allegations of constitution error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Id. At 324, 115 S.Ct. at 865.

DISCUSSION

Claim 1: Failure to Consider Proffered Mitigation

In Claim 1, Petitioner alleges that the trial court improperly confined the scope of its mitigation inquiry to the evidence presented during the sentencing hearing, in violation of the Eight Amendment. (File doc. 36 at 3). [3] Specifically, Petitioner argues that evidence presented at trial, including efforts to save his son once he discovered the injuries were life-threatening, love for the child, lack of intent to kill, remorse, and information rebutting aggravating factors, was not considered at sentencing because the state court indicated it was considering "only those factors presented at the aggravation/mitigation hearing." (File doc. 36 at 3). With the exception of the allegation that the trial court should have considered the unforeseeability of the victim's death as a mitigating circumstance, Respondent's assert Claim 1 was not properly exhausted. (File doc. 38 at 21).

On direct appeal, Petitioner argued that the trial judge failed to "consider mitigating circumstances." (File doc. 20: Appellant's Opening Brief, at 44). Within this claim, Petitioner pointed to evidence presented at sentencing of his good character, love for his child, and previous community service, and to evidence at trial of the unforeseeability of the victim's death and his lack of intent to cause death. (Id.) at 45-46). In his Reply Brief, Petitioner further elaborated on this claim, discussing in depth the Ninth Circuit's opinion in Smith v.McCormick, 914 F.2d 1153, 1165 (9th Cir. 1990). Petitioner referred to Smith, which is based on the constitutional principles established in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982), for the proposition that the sentencing court erred in failing to "consider and give effect to all relevant mitigating evidence offered." (File doc. 20: Appellant's Reply Brief,

at 17). This court rejects Respondents' characterization of Petitioner's appellate claim as simply a failure under state decisional law to "find" certain mitigating circumstances. It is clear from Petitioner's appellate briefing that he alleged the sentencing court's failure "to consider and give effect" to the evidence presented in mitigation. The Arizona Supreme Court was alerted to the federal constitutional underpinnings of the claim and did not limit its consideration of this claim as suggested by Respondent's. See State v. Lopez, 174 Ariz. At 145, 847 P.2d at 1092.

The Court disagrees with Respondent's assertion that Petitioner neglected to argue in his

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[3] "File doc." Refers to documents in this Court's file. "R.O.A." refers to documents in the state court record on appeal. "R.T." refers to reporters' transcripts. File document 20 is a certified copy of the state record in this case.

direct appeal that the trial court failed to consider "lack of intent to kill" as mitigation. (See File doc. 38 at 21 & n.2). Respondents concede that Petitioner fairly presented a claim that the trial court should have considered unforeseeability of the victim's death as mitigating circumstance. This Court discerns no meaningful distinction for purposes of mitigation between unforeseeability and lack of intent. In any event, counsel did specifically assert, within the section of his brief challenging the trial court's consideration of mitigation, that Petitioner did not intent to cause death.

(File doc. 20: Appellant's Opening Brief, at 46). At oral argument before the Arizona Supreme Court, counsel for Petitioner further emphasized: "The last thing in the world this man wanted was for that child to die.
...He did not intend for that child in this case to die." (File doc. 43: Ex. 2 at Side A). To the extent Claim 1 alleges the sentencing court's failure to consider and give effect to proffered evidence of mitigation, the Court finds that the claim is properly exhausted and will be reviewed on the merits.[4]

However, nowhere in the direct appeal or post-conviction proceedings, did Petitioner allege in state court that the sentencing judge "improperly limited" the scope of the mitigation inquiry to only those factors presented at the aggravation/mitigation hearing. The "failure to consider and give effect" argument that was presented on direct appeal is substantially different from the "improper limitation" argument being advanced here. Although not specifically presented to the state's highest court, Petitioner contends the claim is exhausted by virtue of the Arizona Supreme Court's independent review of the propriety of his sentence. See Ariz. R. Crim. P. 31.2(b) (automatic appeal when defendant sentenced to death); A.R.S. §13-4031 (sentence of death may be appealed only to supreme court). This argument is based primarily on the Ninth Circuit's decision in Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993).

In Beam, the petitioner had failed on direct review to specifically appeal the trial court's

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[4] In the pleadings, the parties dispute the scope of this claim. Respondent's assert that similar to claims of

ineffective assistance of counsel, Petitioner must have argued to the Arizona Supreme Court every specific piece of evidence alleged not to have been considered. The court disagrees. The claimed constitutional violation was the trial court's alleged failure to consider available evidence of mitigation. The Arizona Supreme Court analyzed the claim in similar fashion. See State v. Lopez, 174 Ariz. At 143, 847 P.2d at 1090. Habeas counsel's more precise articulation of the mitigation evidence does not fundamentally alter the claim. See Vasquez v. Hillary, 474 U.S. at 260, 106 S.Ct. at 621-22.

application of the "continuing threat" aggravating factor. Nevertheless, the Ninth Circuit held that, because the Idaho Supreme Court was statutorily required to review the petitioner's capital sentence to determine if it was infected by "passion, prejudice, or any other arbitrary factor," that court must have implicitly ruled on the constitutionality of the trial judge's application of the "continuing threat" factor to the petitioner. The Ninth Circuit stated:

> Idaho law establishes a mandatory review system in which the state supreme court is required to examine the record on its own initiative in order to determine whether certain specified types of errors occurred during sentencing... Because the reviewing court has statutory notice of the types of errors for which it is required to examine the record, it is presumed that it has carried out its statutory obligations even when it does not expressly indicate in its opinion that it has done so. As a result, the court's affirmance of the defendant's sentence after mandatory review constitutes at least an implicit rejection of

claims of error that fall within its obligatory review even if the defendant has not raised those claims with specificity.

3F.3d at 1306.

The Beam court expressly distinguished Idaho's mandatory review provision from states whose statutory procedures are better described as automatic appeals. "Under the automatic appeal type of procedure, the defendant is forbidden to waive his appeal to the state supreme court. However, the content of the appeal does not appear to be prescribed by statute, and affirmance by the court does not appear to require rejection of any particular claims on the merits." Id. At 1306 n.3. As an example of an "automatic appeal" provision, the Beam court cited California Penal Code §1239(b). Although the court did not place Arizona's Rule of Criminal Procedure 31.2(b) into a particular category, the Comment to Rule 31.2(b) states that Arizona's rule is similar to California's §1239(b). See Comment, 17 A.R.S. Rules of Crim. Proc., Rule 31.2(b) (West 1998).

Subsequently, the Ninth Circuit in Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997), cert denied, 118 S.Ct. 1533 (1998), rejected application of Beam to the Arizona Supreme Court's review for "fundamental error" under former A.R.S. §13-4035 (repealed in 1995), finding that the statute did not require review for any particular errors that were not argued by the parties. See also Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir. 1996); Woratzeck v. Lewis, 863 F. Suppl. 1079 (D.Ariz. 1994), aff'd, 97 F.3d 329 (9th Cir. 1996). It does not appear, however, that the precise argument advanced here regarding the Arizona

Supreme Court's separate independent sentencing review has been addressed in the context of Beam.

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Petitioner correctly notes that the Arizona Supreme Court, through its jurisprudence, has repeatedly stated that it independently reviews each capital case to determine whether the death sentence is appropriate. See State v. Lopez, 174 Ariz. At 143, 847 P.2d at 1090. In conducting this review, the Arizona Supreme Court evaluates the trial court's aggravation and mitigation findings to ensure they were properly determined and weighed, even if such issues are not directly raised in the appeal. See, e.g., State v. McKinney, 185 Ariz. 567, 581, 917 P.2d 1214, 1228 (1996) (striking application of (F)(2) aggravating factor despite failure to raise challenge on appeal); State v. Stuard, 176 Ariz. 589, 605, 863 P.2d 881, 8971 (1993) (finding defendant's psychiatric condition sufficiently substantial to warrant leniency despite failure of the parties to raise the issue on appeal). The Court also determines "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors." State v. Richmond, 114 Ariz. 186, 196, 506 P.2d 41, 51 (1976).

In State v. Watson, the Arizona Supreme Court explained hat it "painstakingly examine[s] the record to determine whether [the death penalty] has been erroneously imposed." 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981) (citing Richmond), 114 Ariz. At 196, 560 P.2d at 51). In describing its duty, the court observed:

The question before us is not whether the trial court properly imposed the death penalty, but whether, based upon the record before us, we believe that the death penalty

should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants. This is in keeping with the mandate of the United States Supreme Court that we must review carefully and with consistency death penalty cases and not engage in a "cursory" or "rubber stamp" type of review. Profitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976).

The death penalty statute must not be applied freakishly or unevenly. We review each and every death penalty imposed in the State of Arizona, and not only are we in a position to insure that, based upon all the records that come before us, the death penalty is evenly enforced on appeal, but also that it is not inflicted in an arbitrary and capricious manner.

[quotations from Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932 and Godfrey v. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764 (1980), omitted]

We believe Godfrey v. Georgia, supra, mandates that the death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, or the background of the defendant sets him apart from the usual murderer.

129 Ariz. At 63, 628 P.2d at 946. It appears to this Court that a finding by the Arizona Supreme Court that the death

penalty has been properly imposed in a given case rests on both state and federal grounds.

Further support for this conclusion is found in State v. Brewer, 170 Ariz. 486, 826 P.2d 783 (1992). In that case, a capital defendant sought to abandon his direct appeal. The Arizona Supreme Court denied the request, finding that Ariz. R.. Crim. P. 31.2(b) does not permit waiver of a mandatory appeal. The State then argued that even if the appeal could not be voluntarily dismissed, the scope of review was limited by the defendant's waiver. The Arizona Supreme Court disagreed:

The State's argument, however, minimizes our statutorily prescribed powers of review and, if accepted, would defeat the obvious purpose of requiring mandatory appeals in capital cases, which is to insure that the death *sentence* is properly and constitutionally applied. As we read the statutes and the cases interpreting them, this court has a duty, wholly apart from our obligation to review the judgment for errors, to review the validity and propriety of all *death* sentences...

If anything, we believe, as we did in State v. Richmond, 114 Ariz. 186, 196 560 P.2d 41, 51 (1976), that "[t]he legislature charged this court with the duty to correct [death] sentences which are illegal and sentences where we find that the punishment imposed is grater than the circumstances of the case warrant." In Richmond, this view was premised on language from former A.R.S. § 13-1717, now codified at § 13-4037 (A), which instructs in part,

> Upon on appeal by the defendant either from a judgment of conviction or from sentence, if an illegal sentence has been imposed upon a

> lawful verdict or finding of guilty by the trial court, the supreme court shall correct the sentence to correspond to the verdict or finding.

Thus, once a defendant files on appeal, which is automatic in capital cases, we are expressly required by statute to review issues affecting *both* judgment and sentencing in our search for fundamental error.

Appellate review of sentencing, is of course, even more necessary in the context of a capital case. The penalty of death differs from all other forms of criminal punishment in terms of severity and irrevocability, and may not be exacted in the absence of certain constitutional safeguards. That is, the eight and fourteenth amendments prohibit all sentencing procedures creating a substantial risk that the death penalty is inflicted in an arbitrary and capricious manner.

We have long held, therefore, that we are bound by the gravity of the death penalty to insure proper compliance with Arizona's death penalty statute. We cannot fulfill this duty by simply inspecting defendant's first degree murder conviction for fundamental error. We must also conduct *a de novo* review of the trial court's rulings concerning aggravation and mitigation, and then decide independently whether the death sentence should be imposed.

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The automatic appeal mechanism guarantees this court both the opportunity and the vehicle to assess the legality of the

sentence in each capital case. If the record reveals that the trial court, for whatever reason, improperly sentenced a defendant to death, we must overturn that sentence.

170 Ariz. At 493-94, 826 P.2d at 790-91 (emphasis in original; internal citations omitted).

Based on the foregoing, the Court rejects Respondent's assertion that the Arizona Supreme Court "reviewed the propriety of Petitioner's death sentence *not* because of any commandment of the United States Constitution, but because the Arizona legislature gave the supreme court that duty pursuant to A.R.S. §13-703.01 (A)."[5] (File doc. 48 at 8; emphasis in original). Rather, it appears that Arizona's independent sentencing review is functionally indistinguishable from Idaho's.[6] Having decided that affirmance by the Arizona Supreme Court of a defendant's capital sentence "constitutes at least an implicit rejection of claims of error that fall within its obligatory review even if the defendant has not raised those claims with specificity, "Beam v. Paskett, 3 F.3d at 1306, this Court must discern whether Petitioner's "improper limitation of mitigation evidence" is such a claim.

In determining the scope of the state court's sentencing review, this Court is again guided by the Arizona Supreme Court's decision in Brewer:

In short, the State's attempt to curtail the scope of our review must be rejected for the very reason we denied defendant's motion to dismiss this appeal—the propriety of the death penalty is not for the defendant or the trial court

alone to decide. That decision also rests with this court upon automatic appeal and is guided, above all, by the state's narrowly construed statutes specifying the limited circumstances for which a defendant may be deemed death-eligible, see A.R.S. § 13-703....

170 Ariz. At 494, 826 P.2d at 791. Petitioner references no authority suggesting that the scope of Arizona's review encompasses any and all constitutional error at sentencing, and this Court has found

[5] The Court notes that the statute referenced by Respondents was not even in existence at the time of Petitioner's sentencing and appeal. The Arizona legislature enacted A.R.S. § 13-703.01 (A), which directs that "the supreme court shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence," in 1994. Even were this statute in effect, however, the Court disagrees that the supreme court's review is strictly a matter of state law. Nothing in §13-703.01 purports to overturn the pronouncements in Richmond, Watson and Brewer as to the federal constitutional principles underlying the court's "propriety" analysis.

[6] The fact that the scope of Arizona's review is governed by caselaw rather than statute, as in Idaho, does not alter its "mandatory" nature.

none. Rather, it appears from Brewer that the state court's review is limited to ensuring that imposition of a death sentence rests on permissible grounds. See also State v. Watson, 129 Ariz. At 63, 628 P.2d at 946.

In Nave v. Delo, 62 F.3d 1024 (8th Cir. 1995), the Eight Circuit reached a similar conclusion concerning the scope of the Missouri Supreme Court's capital sentencing review. In that case, the Court analyzed a Missouri statute which directed the state's high court to consider " whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Id. at 1039. Determining that the phrase "arbitrary factor" is a catch-all intended only to describe possible improper bases for the imposition of the death penalty, the Nave court held that a claim alleging an unconstitutional sentencing instruction fell outside the limited scope of the state court's mandatory review.

As in Nave, this Court does not ready the Arizona Supreme Court's pronouncement in State v. Richmond that it must determine "whether the sentence of death was imposed under the influence of passion, or any other arbitrary factors," 114 Ariz. 196, 560 P.2d at 51, to encompass implicit review of any constitutional error. Rather, the federal constitutional aspect of the court's review is limited to ensuring that the aggravating factors upon which the death sentences rests constitute permissible grounds. With respect to the instance case, the Court finds that the Arizona Supreme Court's limited review did not necessarily include analysis of whether the sentencing judge improperly limited her mitigation inquiry to the evidence presented at the aggravation/mitigation hearing. Consequently, this aspect of Claim1 is not properly exhausted.

Petitioner separately argues that the entirety of Claim 1 is exhausted by virtue of the Arizona Supreme Court's review of the record for "fundamental error." As

previously noted, this same argument was rejected by the Ninth Circuit in Poland v. Stewart, 92 F.3d 881, at 893. See also Martinez-Villareal v. Lopez, 80 F.3d at 1306 (rejecting argument that Arizona's automatic appeal and search of the record for fundamental error obviates possibility that a federal constitutional claim is defaulted).

Petitioner argues next that even if his claim is unexhausted, he need not satisfy the exhaustion requirement because the state's post-conviction process was unavailable. See 28 U.S.C.§

2254(b)(1)(B). Specifically, Petitioner contends that the Arizona Supreme Court prevented him from obtaining a full and fair adjudication of all claims that could have been raised on direct appeal by restricting the length of his appellate brief. [7] The Court disagrees. A page limitation does not wholly prevent an appellant from raising claims; it merely limits the manner in which they may be presented. See Mueller v. Angelone, 181 F.3d 557, 583 (4th Cir. 1999); Weeks v. Angelone, 176 F.3d 249, 271 (4th Cir. 1999).

In the event the Court finds any of his habeas claims unexhausted, Petitioner makes several arguments to support his contention that he would not be precluded from presenting such claims in state court now. These are: (1) Petitioner did not "knowingly, voluntarily and intelligently" waive any claims; (2) Petitioner's post-conviction counsel was ineffective; and (3) the state court has discretion to correct fundamental error notwithstanding a procedural bar. For the reasons discussed below, the Court finds that

Petitioner does not have any remedies available in state court.

Rule 32.2(a)(3) provides that a defendant shall be precluded from post-conviction relief on a claim if the claim "has been waived at trial, on appeal, or in any previous collateral proceeding." Petitioner relies on the comment to this rule, which states:

[S]ome issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of *sufficient constitutional magnitude*, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim.

Comment, 17 A.R.S. Rules of Crim. Proc., Rule 32.2(a)(3) (West 1998) (emphasis added). Neither the Comment nor Arizona case law defines claims of "sufficient constitutional magnitude" or claims

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[7] At the time of Petitioner's appeal, Arizona's rules provided appellants 40 pages for an opening brief, with no distinction between capital and non-capital cases. Believing 40 pages insufficient, Petitioner's appellate counsel sought to exceed this limit. The state high court allowed an additional 5 pages and ultimately accepted a 49-page brief.

Subsequently, the Arizona Supreme Court amended its rules to provide 80-page briefs in capital cases. See Ariz. R. Crim P.31.13 (f) Petitioner now argues that had he been allowed to prepare an 80-page brief, the claims raised would have been more extensively argued, including more references to violations of the United States Constitution.

of "trial error." However, in Arizona v. Fulminante, 499 U.S. 279, 306-10, 111 S. Ct. 1246, 1262-65 (1991), the United States Supreme Court discussed "trial errors" and "structural errors" in the context of harmless error analysis. A "structural error" is a violation of a constitutional right so basic to a fair trial that it can never be treated as harmless error. Only a few errors are of such magnitude: the total deprivation of the right to counsel at trial; a judge who is not impartial; unlawful exclusion of members of the defendant's race from a grand jury; denial of the right to self-representation at trial; and denial of the right to a public trial. A "trial error" is "simply an error in the trial process itself," rather than a structural defect affecting the framework within which the trial proceeds. Id.[8] Petitioner has not cited any authority which suggests that his "improper limitation of mitigation evidence" claim rises to the level of structural defect. Thus, the fact that Petitioner failed to raise the claim on appeal is sufficient to show that he waived it.

Petitioner relies on another Comment to Rule 32 to argue that relief is available in state court because of the

alleged deficient performance of post-conviction counsel. The Comment states: "If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceeding is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel." Comment, 17 A.R.S. Rules of Crim. Proc., Rule 32.2(a)(3) (West 1998). In State v. Krum, 182 Ariz. 108, 111, 893 P.2d 759, 762 (App. 1995), the Arizona Court of Appeals stated that the Comment "contemplated a possible claim for ineffective assistance of counsel in post-conviction proceedings, at least as a defense to issue preclusion." However, the Arizona Supreme Court vacated the court of appeals' opinion in State v. Krum, 183 Ariz. 288, 295, 903 P.2d 596, 603 (1995). The Arizona Supreme Court declined to address the lower court's interpretation of the Comment because there was no issue of procedural default in the case. Regarding ineffectiveness of post-conviction counsel as a substantive claim, the Arizona Supreme Court held:

[P]ost-conviction proceedings generally provide a remedy only for *constitutional* errors involving the defendant's trial or direct appeal of right...[I]neffective assistance on a prior PCR petition is not a valid, substantive claim under Rule 32

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[8] See Fulminante, 499 U.S. at 306-7, 111 S.Ct. at 1263, for examples of trial errors.

because there is no federal constitutional right to effective counsel in a PCR proceeding. Thus, even if a statutory right to effective assistance existed, Rule 32 would not provide a remedy for its violation. See Ariz. R.Crim. P.32.1 (listing limited claims cognizable under Rule 32).

183 Ariz. At 292, 903 P.2d at 600 (emphasis in original). Thus, Krum does not support Petitioner's contention that the alleged ineffectiveness of his post-conviction counsel provides an avenue of relief for any claims that could have been presented by such counsel. Petitioner's reliance on a mere Comment to Rule 32 is not persuasive.

Finally, Petitioner argues that he has a remedy in state court because in Rule 32 proceedings a trial court can, in its discretion, a review the record for fundamental error and grant relief if such error is found. Petitioner cites Montgomery v. Sheldon, 182 Ariz. 118, 893 P.2d 1281 (1995). Petitioner's reliance on Montgomery is misplaced. IN that case, the Arizona Supreme Court held that *when a defendant pleads guilty,* the court of appeals in a Rule 32 proceeding is required to review the record before it for fundamental error because a Rule 32 proceeding is the only "appeal" for a defendant who pleads guilty. Id. at 1190-20, 893 P.2d at 1282-83; but see State v. Smith, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) (court of appeals no longer must search for fundamental error when considering whether to grant review of a pleading defendant's denial of post-conviction relief following repeal of A.R.S. §13-4035). Petitioner has cited no authority to support his suggestion that in Rule 32 proceedings a trial court could review the record for fundamental error when Petitioner already had an appeal in which the Arizona supreme Court reviewed the record for fundamental error. In addition, even if a trial

court could exercise such discretion, there is no authority to support the suggestion that the mere possibility of fundamental error review can excuse the default of claims which are clearly precluded under the express provisions of Rule 32. See Krone v. Hotham, 181 Ariz. 364, 366, 890 P.2d 1149, 1151 (1995) (emphasizing rule of preclusion for failure to raise all claims in a first post-conviction petition).

Based on the foregoing discussion, the Court finds that the "improper limitation" aspect of Claim 1 was not fairly presented to the state's highest court. The Court further concludes that Petitioner would be precluded under Rule 32.2(a) (3) if he raised it now. Therefore, Petitioner has no remaining avenues for relief in state court.

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As cause for his failure to properly exhaust the "improper limitation" aspect of Claim 1, Petitioner points to the page limitations imposed by the appellate court. However, Petitioner has not shown that the 40-page limit actually caused the default of this claim or that it was patently unreasonable. The existence of a page limitation that forces a measure of strategic choice while affording an opportunity to present claims is not unreasonable. See Muller v. Angelone, 181 F.3d at 585. As the Supreme Court has recognized,

[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a grater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes— and when page limits on briefs are widely imposed...A brief that raises every colorable

issue runs the risk of burying good arguments —those that, in the words of the great advocate john W. Davis, "go for the jugular" —in a verbal mound made up of strong and weak contentions.

Jones v. Barnes, 463 U.S. 745, 752-53, 103 S.Ct. 3308, 3313 (1983) (citation omitted).

Petitioner also argues as cause the ineffectiveness of appellate counsel for failing to raise the claim on direct appeal. A claim of ineffective assistance must be presented to the state court as an independent claim before it may be used to establish cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 489, 106 S. Ct. 2639, 2640 (1986). Petitioner did not present this claim of ineffective to the state court as an independent claim. Because Petitioner has failed to establish cause for the procedural default, the Court need not reach the question of prejudice. See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

The "improper limitation" aspect of Claim 1 is procedurally barred. The Court will review the "failure to consider and give effect" aspect of Claim 1 on the merits.

Claim 2: Insufficient Sentencing Record

Petitioner divides this claim into two sub-parts: (A) the trial court failed to provide an adequate record by which the Arizona Supreme Court could conduct constitutionally mandated review; and (B) the trial court failed to make an adequate record of whether it considered all mitigation, in violation of the Eight and Fourteenth Amendments. (File doc. 36 at 11, 22). Respondents assert that neither subpart states a claim for federal habeas relief because the United

States Constitution does not require any particular appellate review of death sentences. In the

alternative, Respondents contend Claim 2 was not fairly presented to the Arizona Supreme Court.

In Jeffers v. Lewis, 38 F. 3d 411, 418 (9th Cir. 1994), an en banc panel of the Ninth Circuit held that itemization of mitigation evidence is not required under either Arizona law or the federal constitution. "[D]ue process does not require that the sentencer exhaustively document its analysis of each mitigating factor *as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant*." Id. (citing Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993)) (emphasis added). The Court disagrees with Respondents that Petitioner has failed to state a claim for habeas relief. It is clear from Jeffries that a due process violation may occur if the record does not reveal whether the state court considered all offered mitigating evidence.[1] The Court therefore considers whether Claim 2 is properly exhausted.

On direct appeal, Petitioner argued that the trial court erred in not specifying the basis for its findings regarding aggravation and mitigation. (File doc. 20: Appellant's Opening Brief, at 44). In doing so, Petitioner cited State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985),

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[1] The Court notes that resolution of Petitioner's Claim 1 (whether the state court considered proffered mitigation evidence) is determinative of Claim 2.

and argued that the trial court failed to comply with the mandate of that case. In Leslie, the Arizona Supreme Court held that although detailed sentencing findings are neither required nor necessary, "the better practice is for the trial court to place, on the record, a list of all factors offered by a defendant in mitigation and then explain his reasons for accepting or rejecting them." Id. at 50, 708 P.2d at 731. The court reasoned that such practice would enable the reviewing court to determine whether the sentencing judge's consideration of mitigating factors complied with the constitutional requirements of Lockett and Eddings.

In his appellate reply brief, Petitioner elaborated on his inadequate record claim, directing the Arizona Supreme Court to the Ninth Circuit's decision in Smith v. McCormick, 914 F.2d at 1166. Specifically, Petitioner quoted the Smith's court conclusion that "[a]n incomplete record in capital sentencing is constitutionally inadequate." (File doc. 20: Appellant's Reply Brief, at 18). The Court finds that Petitioner's discussion of the Leslie and Smith decisions in his appellate briefs was sufficient

to alert the Arizona Supreme Court to the constitutional underpinnings of his claim. The Court therefore will address Claim 2 on the merits.

Claim 3: Failure to Make Enmund/Tison Findings

In Claim 3, Petitioner asserts that no appropriate Enmund/Tison finding was made in the state court. (File doc. 36 at 27). Respondents counter that Petitioner failed to raise the claim on appeal or in post-conviction proceedings. (File doc. 38 at 23).

Petitioner admits Claim 3 was not specifically presented to the state's high court. He argues instead that the claim is exhausted because one of the Arizona Supreme Court justices posed an Enmund/Tison question to the State's attorney during oral argument of this direct appeal, and by virtue of the state court's independent review of his sentence and its review for fundamental error. (File doc. 43 at 67-70, 72-74). Petitioner also argues that the claim is of "sufficient constitutional magnitude" such that the State must prove intentional waiver before further post-conviction relief would be precluded. (Id. at 71). Thus, according to Petitioner, he has an available state remedy should this Court find the claim unexhausted. Finally, Petitioner asserts ineffective assistance of appellate counsel as cause for the failure to present the claim and argues that a fundamental miscarriage of justice would occur if the claim is not decided on the merits because lack of Enmund/Tison eligibility renders him "actually innocent" of the death penalty. (Id. at 75-77).

Regardless of whether Petitioner properly exhausted his Enmund/Tison argument, this Court finds that the claim is plainly meritless. See 28 U.S.C. 28 U.S.C. § 2254(b)(2) (West 1999) (district court may deny habeas application on merits notwithstanding failure to exhaust).[2] In Enmund v. Florida, the Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty upon persons who did not themselves kill, attempt to kill, or

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[2] Because Petitioner's habeas petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, the provisions of the Act apply to this case. Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059 (1997).

intend to kill. 458 U.S. 782, 801, 102 S. Ct. 3368, 3378-79 (1982). In Tison v. Arizona, the Court expanded on Enmund, holding that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state." 481 U.S. 137, 157, 107 S. Ct. 1676,

1688 (1987).

Here, Petitioner was convicted by a jury of "intentional or knowing" child abuse and felony murder. With respect to the elements of child abuse, the trial court instructed the jurors as follows:

Child abuse is committed when any person *causes a child to suffer physical injury under circumstances likely to produce death or serious physical injury.*

The defendant is charged with knowing and intentional child abuse. The crime of knowing and intentional child abuse also has the lesser-included crimes of reckless child abuse and negligent child abuse.

. . .

Serious physical injury includes physical injury which cerates a reasonable risk of death or which causes serious and permanent disfigurement or serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

Intentionally means, with respect to a result or the conduct described the by statute defining an offense, that a

person's objective is to cause that result or to engage in that conduct.

Knowingly means, with respect to the conduct or to a circumstance described by a statue defining an offense, that a person is aware or believes that his conduct is of that nature or that the circumstance exists.

. . .

It is the law that if a defendant is found guilty of intentional or knowing child abuse, as charged in the indictment, and in the course of and in furtherance of such offense a death results, that defendant must also be found guilty of first degree murder.

(File doc 20: R.T. 4/10/90 at 120-23) (emphasis added). In light of the instructions, it is clear the jury found that Petitioner actually killed. Furthermore, at sentencing, the trial court made specific culpability findings:

As to County Two, First Degree Murder, the Court finds beyond a reasonable doubt that the defendant, the father of the child, Anthony, *willfully and intentionally, physically abused the child entrusted to his care and caused his death.*

(File doc. 20: R.T. 5/17/90 at 19; emphasis added). Petitioner's claim that he was sentenced to death in the absence of a finding that he killed, attempted to kill, or intended to kill is meritless.

Claim 4: Failure to Suppress Involuntary Admissions

Respondents admit this claim is properly exhausted. (File doc. 38 at 23). Therefore, the Court will review Claim 4 on the merits.

Claim 5: Failure to Allow Defense Character Witness

Claim 6: Admission of Gruesome Photographs

Petitioner claims the trial court violated his federal constitutional rights to due process and a fair trial by precluding testimony as to his reputation for non-violence and by allowing admission

of gruesome autopsy photographs. (File doc. 36 at 40, 47). On direct appeal, the Arizona Supreme Court found that the trial judge erroneously precluded the character witnesses' testimony but that the error was harmless. Respondents acknowledge that Petitioner raised claims concerning the character witnesses and photographs in his direct appeal but assert they were based solely on the Arizona Rules of Evidence, not the federal constitution. (File doc. 38 at 23-24). Respondents further assert that any claim regarding the propriety of the state court's harmless error analysis with respect to the character testimony is not cognizable in federal habeas proceedings.

Petitioner concedes that he failed to present the federal due process aspect of Claim 5 in state court but argues that it is nonetheless exhausted because it is

"virtually identical" to the state claim. Similarity between claims, however, is insufficient to satisfy the exhaustion requirement. The Supreme Court has direct that "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." Duncan v. Henry, 513 U.S. at 365-66, 115 S. Ct. at 888; see alo Hiivala v. Wood No. 98-35265, 1999 WL 979636, *7 (9th Cir. Oct. 29, 1999) (applying Duncan and holding "mere similarity" between claim of state and federal error insufficient); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) (same).

With regard to Claim 6, Petitioner asserts it was fairly presented because in the text of his appellate argument he cited State v. Amaya-Ruiz, 166 Ariz. 152, 800 P.2d 1260. In that case, the Arizona Supreme Court addressed whether the defendant's "due process rights" were violated by admission of gruesome photographs. Id. at 170, 800 P.2d at 1078. Relying on cases from the First and Seventh Circuits, Petitioner contends the Amaya-Ruiz citation was sufficient to alert the Arizona Supreme Court to the federal constitutional basis of his claim. The Court disagrees.

In the cases cited by Petitioner, the circuit courts found a claim fairly presented where the petitioner had referenced state cases whose holdings relied on federal constitutional analysis. See Verdin v. O'Leary, 972 F.2d 1467, 1480 (7th Cir. 1992); Tart v. Massachusetts, 949 F.2d 490, 494 (1st Cir. 1991) ("[C]itation to a state decision whose holding is prominently predicated on federal precedent is sufficient."). In Amaya-Ruiz, however, the Arizona Supreme Court's analysis of the gruesome

photographs claim was not based on the Due Process Clause, but rather on prior state case

Law and Rule 403 of the Arizona Rules of Evidence. The reference to "due process" in Amaya-Ruiz was simply the Court's recitation of the appellant's claim. See 166 Ariz. at 170, 800 P.2d at 1278 ("Defendant contends that his due process rights were violated by the admission of gruesome photographs.") Moreover, it is unclear whether this reference to due process rights were based on the federal constitution, state constitution, or both. See Ariz. Const. art. II, § 4 ("No person shall be derived of life, liberty, or property without due process of law."). The Court finds that Petitioner did not fairly present the federal constitutional theory of Claim 6 to the state's highest court.

For the reasons previously discussed at page 12-15, the Court also rejects Petitioner's arguments that Claims 5 and 6 are exhausted because the Arizona Supreme Court searched the record for fundamental error and that he has state remedies available should the Court finds his claims unexhausted. Petitioner asserts appellate counsel's ineffectiveness as cause for the failure to properly exhaust the claims, but did not separately present such a claim to the state court. Cousnel's alleged ineffectiveness therefore cannot constitute cause. See Murray, 477 U.S. at 489, 106 S. Ct. at 2640. Because Petitioner has failed to establish cause, the Court need not consider prejudice.

Petitioner also contends that a fundamental miscarriage of justice will occur if the Court does not consider the merits of Claim 5 or 6. Specifically, Petitioner

argues that had the precluded character witnesses testified, it would have "strong bolstered" defense counsel's theory of the case (lack of intent) and created a reasonable doubt as to Petitioner's intent to kill. (File doc. 36 at 42-46). As a result, the jury would have found him guilty of negligent or reckless child abuse, neither of which is a predicate for felony murder. In addition, Petitioner asserts that admission of the gruesome autopsy photographs had to have meaningfully affected the jurors' emotions during deliberation. (Id. at 51.)

In Schlup v. Delo, the Supreme Court held that to be successful, a claim of actual innocence requires petitioner to show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S. at 327, 115 S. Ct. at 867. In light of the evidence presented at trial, most notably Petitioner's inconsistent statements concerning the cause of his son's injuries, the admission that he had gotten angry and hit the child, and the autopsy results, the Court finds that Petioner has not established the narrow "actual innocence" gateway. Consequently,

Claims 5 and 6 are procedurally defaulted and will not be considered on the merits.

Claim 7: Insufficient Evidence of the A.R.S. § 13-703(F)(6) Aggravating Factors

Petitioner argues that application of the "heinous, cruel, or depraved" aggravating factor to his case is "arbitrary and capricious" in violation of the Eighth and

Fourteenth Amendments. (File doc. 36 at 52). Respondents counter that the claim was not fairly presented in state court. (File doc. 38-at 25).

On direct appeal, Petitioner argued only that the sentencing judge's "heinous, cruel, or depraved" finding under A.R.S. § 13-703(f)(6) was unsupported by the record. (File doc. 20; Appellant's Opening Brief, at 43). Nowhere in the appellate briefs did he allege that application of the (F)(6) aggravating factor violated his federal constitutional right.

However, as discussed supra at pages 8-12, the Arizona Supreme Court has a duty to independently review the propriety of Petitioner's sentence to ensure that it rests on constitutionally permissible grounds. Although the scope of this review is quite limited, the Court finds that a claim alleging unconstitutional application of an enumerated aggravating factor may very well fall within the narrow class of claims implicitly rejected by the Arizona Supreme Court when it affirmed Petitioner's sentence. See Beam v. Paskett, 3 F.3d at 1306. The Court therefore will address the merits of Claim 7.

Claim 8: Failure to Find Mitigating Factors

In Claim 1, Petitioner alleged that the sentencing court failed to consider all of his proffered mitigation evidence. Claim 2 alleged that the court failed to made an adequate record that it considered all mitigation evidence. In the instant Claim, Petitioner argues that the state court arbitrarily failed to find the existence of two "uncontroverted" mitigating circumstances - good conduct while incarcerated and past military service. (File doc. 36

at 56).

Respondents assert that Petitioner argued on direct appeal only that the sentencing judge failed to find evidence of good character and prior community service as mitigation, not conduct while incarcerated or military service. (File doc. 38 at 25). Respondents therefore contend that Claim 8 was not fairly presented below.

Regardless of whether Petitioner adequately described the operative facts of this claim, the

Court finds that the legal theory was not fairly presented. Petitioner argued on direct appeal that the trial court failed to consider proffered mitigating evidence (Claim 1), failed to specify its aggravating and mitigating findings (Claim 2), and failed to find the existence of mitigating factors. Nowhere in the opening brief did Petitioner specifically assert that these failures amounted to a violation of the federal constitution. Rather, Petitioner referenced state caselaw and A.R.S. § 13-703(G), which outlines consideration of mitigating circumstances for capital sentencing.

Nevertheless, in Claims 1 and 2, the Court found that Petitioner had adequately presented the federal constitutional underpinnings of those claims by alerting the Arizona Supreme Court, in his reply brief, to the Ninth Circuit's decision in Smith v. McCormick, 914, F.2d at 1153. (See discussion, supra, at pages 6 and 17). However, nothing in the reply brief nor Petitioner's description of Smith could have alerted the state court to the

argument now being advanced: that the sentencing court arbitrarily failed to find proferred evidence mitigating in violation of the Eighth and Fourteenth Amendments. The "failure to find" claim raised by Petitioner on appeal merely alleged a violation of state law. See Eddings v. Oklahoma, 455 U.S. at 114-15, 102 S. Ct. at 876-78 (sentencer determines weight to accord relevant mitigating evidence); Walton v. Arizona, 497 U.S. 639, 649, 110 S.Ct. 3047, 3055 (1990)(Lockett does not preclude state from specifying how mitigating circumstances are to be proved).

The Court finds that Claim 8 was not fairly presented below. The Court further concludes that it is not the type of *constitutional* claim that falls within the narrow scope of Arizona's mandatory independent review. (See discussion, supra, at 8-12). Petitioner presents no arguments of cause and prejudice, or miscarriage of justice. Claim 8 is therefore defaulted and will not be considered on the merits.

Claim 9: Unconstitutionality of Arizona's Death Penalty Statute

In this claim, Petitioner alleges that Arizona's death penalty statute violates the Eighth Amendment because it fails to narrow the class of defendants subject to the death penalty. (File doc. at 60). Petitioner did not present this claim to the state's highest court. Nonetheless, he argues that the Arizona Supreme Court necessarily reached the merits of the claim through its independent review of the propriety of the death penalty. The Court disagrees. As discussed supra at pages 8-12, the

Arizona Supreme Court's independent review is limited to ensuring that imposition of a death sentence rests on permissible grounds. Claim 9 is a general challenge to the constitutionality of Arizona's death penalty, not a claim of error concerning application of any particular aggravating factor. Cf. Hoffman v. Arave, 973 F. Supp. 1152, 1159 (D. Idaho 1997) ("Claims that make a broad-based constitutional challenge to Idaho's death penalty process. . . are not encompassed by § 19-2827 or Beam.").

Claim 9 was not fairly presented below, and the Court finds that no sate remedies remain available. Petitioner does not present any arguments concerning cause and prejudice, or a miscarriage of justice. Claim 9 is therefore procedurally barred.

Claim 10: Failure to Conduct Proportionality Review

In Claim 10, Petitioner contends that the Arizona Supreme Court failed to conduct a proportionality review, in violation of his rights under the Eighth and Fourteenth Amendments. (File doc. 36 at 68). However, Petitioner did not argue in his direct appeal that the United States Constitution required that the state court perform a proportionality review. Rather, he simply asserted, based on prior state caselaw, that the Arizona Supreme Court was required to conduct such a review. The claim was not fairly presented below, and the Court finds that no remedies remain available. Petitioner does not present any arguments concerning cause and prejudice, or a miscarriage of justice. Claim 10 is therefore procedurally barred.

Alternatively, Claim 10 is meritless. Where

statutory sentencing procedures adequately channel the sentencer's discretion, a proportionality analysis is not constitutionally required. McCleskey v. Kemp, 481 U.S. 279, 306, 107 S. Ct. 1756, 1775 (1987); Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871 (1984). Arizona's sentencing procedures for imposing the death penalty adequately channel the sentencer's discretion. See Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990); Richmond v. Lewis, 506 U.S. 40, 113 S. Ct. 528, 536 (1992). In addition, the Ninth Circuit has rejected a similar claim that a petitioner's constitutional rights were violated when the Arizona Supreme Court failed to conduct a proportionality review. See Ceja v. Stewart, 97 F.3d 1246, 1251 (9th Cir. 1996).

Claim 11: Unconstitutional "Double-Weighing" of Victim's Age as Aggravating

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Factor

In this claim, Petitioner argues that the sate court double-weighed the age of the victim by finding both the (F)(6) "heinous, cruel, or depraved" aggravating factor, in part, on the fact that the victim was a baby, as well as the (F)(9) aggravating factor for murders in which the victim is under 15 years of age. See A.R.S. § 13-703(F)(6), (F)(9).

On direct appeal, in an argument concerning lack of evidence to support a finding that the murder was committed in a heinous or depraved manner, Petitioner stated: "The court already found that the age of the victim constituted a separate aggravating factor. To use the age alone as the sole factor for finding the murder to be

especially heinous or depraved is duplicative, and *not within the contemplation of the statute.* (File doc. 20: Appellant's Opening Brief, at 43; emphasis added). Petitioner did not argue that double-weighing of the victim's age amounted to a violation of the federal constitution. Nor does the Court believe this claim of constitutional error was necessarily considered by the Arizona Supreme Court when it independently reviewed the propriety of Petitioner's sentence. Petitioner does not present any cause and prejudice or miscarriage of justice arguments. The Court finds that Claim 11 was not fairly presented to the state's highest court and is procedurally barred from review on the merits.

Claim 12: Ineffective Assistance of Counsel

For habeas Claim 12, Petitioner alleges that the following sixteen instances of counsel's ineffectiveness violated his rights under the Sixth and Fourteenth Amendmets:[3]

A. Failure to adequately prepare and present evidence to rebut the (F)(6) aggravating factor;

B. Failure to investigate and present the following types of mitigation evidence:

1. organic brain damage
2. lack of intent to kill due to organic

[3] For ease of reference, the Court has renumbered Petitioner's ineffectiveness claims.

brain damage

3. dysfunctional childhood
4. childhood sexual assault
5. good employment record
6. remorse

C. Failure to object to presentation by the State of the victim's suffering caused by old

injuries not attributable to Petitioner;

D. Failure to adequately investigate cause of the victim's injuries;

E. Failure to conduct an adequate pre-trial investigation as to Petitioner's diminished capacity;

F. Failure to move for preclusion of prior instances of abuse suffered by victim;

G. Failure to object to removal for cause of venireperson;

H. Failure to object to replica of bedroom in the courtroom;

I. Failure to object to irrelevant and prejudicial facts;

J. Cumulative effect of counsel's deficiencies at trial and sentencing;

K. Failure by appellate counsel to raise numerous significant issues;

(File doc. 36 at 76-111).

Respondents admit subparts F and H were properly exhausted and should be reviewed on the merits. To the extent subpart K complains of appellate counsel's failure to argue on appeal "that the old injuries to [the victim] were inadmissible, that the [bedroom] replica denied Mr. Lopez a fair trial, that the timing of the prosecutor's election of felony murder denied the defendant a fair trial, that the jury instructions were or were not presented amounted to fundamental error and that the prosecutor committed misconduct in opening and closing argument," (File doc. 20: Petition for Review, at 34), the Court finds that subpart K was properly exhausted to the state's highest court and should be reviewed on the merits.

The remainder of Petitioner's ineffectiveness claims were never presented to the Arizona Supreme Court. For the reasons discussed at pages 13-15, the Court finds that Petitioner has no available state remedies. The claims would be found precluded under rule 32.29(a)(3) if presented now. Petitioner presents no cause and prejudice arguments but does allege that a fundamental miscarriage of justice will occur if the defaulted claims are not considered on the merits.

Petitioner first asserts that he is actually innocent of the (F)(6) "heinous, cruel or depraved" aggravating factor that counsel failed to present all available mitigating evidence. But for existence of the (F)(6) factor and counsel's ineffective representation, he would not have received the death penalty. However, to pass though the "innocent of death sentence" gateway, Petitioner must

show that, but for constitutional error, no reasonable factfinder would have found him eligible for the death penalty under Arizona law. Sawyer v. Whitley, 505 U.S. at 336, 112 S. Ct. at 2517 (emphasis added). Even assuming the (F)(6) factor was erroneously applied and counsel failed to present mitigation evidence, Petitioner is still eligible for the death penalty because the sentencing judge also found that he killed a person under the age of 15, itself an aggravating factor. See A.R.S. § 13-703 (F)(9); see also A.R.S. § 13-703 (E) (defendant death eligible if one or more aggravating factor exist).

Petitioner next argues that but for counsel's ineffectiveness at trial, he would not have been found guilty of child abuse and is thus actually innocent of felony murder. He argues that had counsel properly cross-examined the victim's mother and presented evidence that the child had at times appeared bruised when in her care and that the fatal injuries may have been inflicted as long as a week prior to death, counsel would have created a

reasonable doubt as to the identity of the perpetrator. Petitioner also asserts that but for the cumulative impact of counsel's ineffectiveness, an acquittal probably would have resulted. Whether a reasonable doubt exists, however, does not satisfy the narrow "actual innocence" gateway. As discussed supra at page 31, the Court finds that Petitioner has failed to establish that it is more likely than not that *no* reasonable juror would have found him guilty beyond a reasonable doubt. See Schlup v. Delo, 513 U.S. at 327, 115 S. Ct. at 867.

In sum, the Court finds that Claims 122-F, H, and K are properly exhausted and appropriate for review on the merits. The remaining subparts of Claim 12 are procedurally defaulted, and the Court finds that a fundamental miscarriage of justice will not occur if they are not considered on the merits.

CONCLUSION

The Court finds that Claims 1 (in part), 5, 6, 8-11, 12-A thru E, 12-G, 12-I, and 12-J are procedurally barred. Claims 1 (in part), 2, 4, 7, 12-F, 12-H, and 12-K are properly exhausted and will be decided on the merits in a separate order. The Court finds that Claim 3 is meritless.

Based on the foregoing,

IT IS ORDERED that, no later that forty-five (45) days following entry of this Order, Petitioner shall file a Memorandum regarding the

merits of Claims 1 (in part), 2, 4, 7, 12-F, 12-H, and

12-K.

IT IS FURTHER ORDERED that no later than forty-five (45) days following the filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits.

IT IS FURTHER ORDERED that no later than thirty (30) days following the filing of Respondent's Response, Petitioner may file a Reply

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IT IS FURTHER ORDERED that Claims 1 (in part), 5, 6, 8-11, 12-A thru E, 12-G, 12-I, and 12-J are procedurally barred.

IT IS FURTHER ORDERED that Claim 3 is denied on the merits.

IT IS FURTHER ORDERED that if, pursuant to Local Rule 1.10(p), Petitioner or Respondents file a Motion for Reconsideration of this Order, such motion shall be filed within fifteen (15) days of the filing of this Order. The filing and disposition of such motion does not toll the time for the filing of any merits brief scheduled under this Order.

IT IS FURTHER ORDERED that the Clerk of the Court forward a copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 3rd day of December, 1999.

WILLIAM D. BROWNING
Senior United States District Judge

Copies to all counsel of record.

(2)

No. 06-99000 07-683 12-26-07

IN THE SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO,
Director, Arizona Department of Corrections, et al.,
Petitioners,

v.

GEORGE MOLINA LOPEZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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*Cary Sandman
WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.
5210 E. Williams Circle, Suite 800
Tucson, Arizona 85711
Telephone: (520) 790-5828

Kevin Clarence Lerch
LAW OFFICE OF KEVIN LERCH
3661 N. Campbell, #118
Tucson, AZ 85719
Telephone: (520)620-1900

*Counsel of Record

CAPITAL CASE

COUNTER STATEMENT OF QUESTIONS PRESENTED

During the state post-conviction proceedings, the trial court, after conducting an evidentiary hearing, addressed the merits of Respondent's claim that his lawyer was ineffective at the sentencing phase of the capital trial. The state supreme court denied this claim, among others, through a post-card denial. In habeas corpus proceedings, the district court, however, dismissed this claim on a procedural ground and therefore did not address it on the merits. Applying *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Picard v. Connor*, 404 U.S. 270 (1971), the court of appeals determined that in fact, the claim was exhausted in state court, and after taking a "quick look" at the merits of the claim, ascertained that Respondent sufficiently alleged the deprivation of a constitutional right. The court of appeals then remanded the matter to the district court for consideration of the claim's merits.

The scope and breadth of the ruling below is narrow and specific to the unique facts of Respondent's case.

1. Should the Court grant Certiorari to review a question of law, when the necessary factual premise for that question does not exist in the case at bar?

2. Is Certiorari appropriate to review a court of appeals' decision on issues that were not decided by that court?

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STATUTES, RULES, REGULATIONS

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STATEMENT

In 1990, Respondent George Lopez was sentenced to death for the child abuse felony murder of his one year old son, Anthony. The relevant question is whether the federal district court should consider the merits of Lopez' *exhausted* claim, that his trial counsel rendered ineffective assistance, by failing to investigate and present key mitigating evidence at his capital sentencing. The court of appeals correctly ruled the district court should. Below, Lopez presents the facts and law relevant to the Court's consideration of the Petition.[1]

Finding that the aggravating circumstances outweighed the *proffered* mitigating evidence, the Arizona trial court sentenced Lopez to death. (ER 274.) The death sentence was narrowly affirmed by only a slim 3-2 margin, when two of the Arizona justices expressed grave doubts over whether the trial judge had actually considered a principal mitigating circumstance; Lopez' lack of intent to kill his son. Concluding they were unable to discharge their Eighth Amendment duty of independent appellate review on this record, the two justices refused to affirm the sentence. *State v. Lopez*, 174 Ariz.131, 145-146, 847 P.2d 1078, 1092-1093 (1992).

Following the narrow affirmance of his sentence, Lopez sought post-conviction relief from the Arizona trial court. The record shows that during the state post-conviction proceedings, Lopez exhausted the claim that he had been deprived of the effective assistance of counsel at sentencing, when his trial counsel failed to investigate and present reasonably available mitigating evidence.

Prior to his appointment to represent Lopez, trial counsel had never even tried a felony case to a jury. Needless to say, he had no capital case experience. (ER 359; 380-381.) During the

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[1]Lopez adopts the facts and procedural history set forth in the court of appeals' decision, contained in Petitioner's Appendix B, at B-21-B-25.

Arizona post-conviction proceedings, counsel testified that he did not believe this was a case where the death penalty would ever be imposed. He believed the state lacked sufficient evidence to support a death sentence – a startling assumption – since, under Arizona's death penalty statute in A.R.S. § 13-703(F)(8), a murder of a child automatically renders an Arizona capital defendant eligible for the death penalty. (ER 360-362.) Trial counsel unreasonably discounted the risk that his client might be subject to punishment by death, and he prepared (or better stated, he failed to prepare) for the sentencing proceedings accordingly.

The evidence Lopez presented during the state post-conviction proceedings shows that trial counsel did not conduct an investigation comprised of efforts to discover all reasonably available mitigating evidence or evidence to rebut any aggravating evidence introduced by the prosecutor. (ER 368-371; 388; 403-419.) By definition, this describes a lawyer whose actions are objectively unreasonable and deficient. *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background); *Wiggins v. Smith*, 539 U.S. 510, 521-524 (2003). Lopez' trial counsel conducted no investigation targeted at discovering evidence of Lopez' life, or educational and medical history. (ER 368-370; 596(b)-596(d).) Had he done so, he would have learned about Lopez's deprived and nightmarish childhood. (ER 368-370; 596(b)-596(d).) As a result of counsel's deficient performance, he failed to present evidence: (i) that Lopez grew up in extreme poverty, living in a shack without electricity with alcoholic parents; (ii) that the family setting was rife with horrific emotional abuse and domestic violence; (iii) that Lopez lacked adequate clothing or food and went to school hungry; and (iv) that Lopez started drinking at age 12, and entered the eighth grade with a second grade reading level and failed to graduate from high school. (ER 405; 411; 596(b)-596(d).)

During the state post-conviction proceedings, the trial court authorized funding and expert assistance to help Lopez present his ineffective assistance claim. Lopez used that court funded assistance to retain Carla Ryan, a legal expert in death penalty sentencing. Not only did the state trial court appoint an expert to assist Lopez, the court also conducted evidentiary hearings to afford Lopez the opportunity to present his claim. Ms. Ryan testified at these state court evidentiary hearings. Ryan's testimony during the state post-conviction proceedings addressed counsel's deficient performance in several respects. She testified that effective performance in the penalty phase of a capital case requires that counsel conduct sufficient investigation and engage in sufficient preparation to be able to present and explain the significance of all available mitigating evidence, and that Lopez' trial counsel failed in those key tasks. (ER 404-419.) Ryan testified that counsel had a duty to thoroughly investigate Lopez' background and social history, but he never did. (ER 410-411.) Ryan also testified counsel had a duty to investigate Lopez' mental health, but he failed here as well, when he sent Lopez for a "general" mental status exam, without first providing critical available evidence of Lopez' family, medical and social history to Dr. Morris, the examining psychologist. (ER 413-414.) Ryan's testimony squarely defined the obligations that objectively reasonable counsel must fulfill in order to secure the accused's Sixth Amendment right to effective assistance of counsel. *Wiggins, supra.*

Ryan testified that as a result of the failures to perform the minimal duties owed to his client, that Lopez' trial counsel failed to discover and present important evidence to the examining psychologist and the sentencing judge, that Lopez grew up in a dysfunctional household with parents who were severe alcoholics. (ER 404-405.) As but one consequence to growing up with alcoholic parents, Ryan testified that Lopez started drinking at age 12, entered eighth grade with a second/third grade reading level, and never graduated high school. (ER 404-405; 411; 413.)

As part of the state court's consideration of the subject ineffective assistance claim, Lopez' trial counsel also testified during the post-conviction proceedings. His testimony focused squarely on his lack of preparation for the mitigation phase of Lopez' sentencing. Trial counsel's testimony showed that he failed to prepare for the sentencing, and had no tactical reasons for his inaction. (ER 360-362.) Asked what he did to prepare for the presentation of mitigation at sentencing, trial counsel conceded that all he did was to assign his associate the task of presenting some good character witnesses. (ER 376-379.) Counsel had no tactical reasons for failing to investigate readily available records pertinent to Lopez' disadvantaged background. (ER 368-370.) Counsel had no justification for sending Lopez to Dr. Morris without the fruits of a social history investigation; admitting to his deficient performance by acknowledging he sent Lopez to Morris without any direction at all. (ER 374-375.) In substance, the Arizona post-conviction record demonstrated that trial counsel abandoned Lopez to an inexperienced, unqualified associate told only to look for some good character witnesses, and did nothing to investigate or prepare to present reasonably available mitigating evidence concerning Lopez' tragic background and social history that supported a life sentence.

Counsel's unprofessional errors had serious consequences at Lopez' sentencing, where, despite counsel's deficient performance, significant mitigation evidence was before the trial court, rendering it all the more certain, that had the omitted evidence been presented at sentencing, there would have been a "reasonable probability" for a different outcome.

The trial court had received evidence at sentencing that Lopez had a long history of service to the community and to his country; he was predicted to be a force for good in the prison system, if granted a life without parole sentence; and what is more, that he did not intend to kill his son

Anthony.[2]

At the conclusion of the state post-conviction hearings, the trial court denied the ineffective assistance claim on its merits, under its ruling, entitled: "Claim That Mr. Bruner Failed to Investigate and Present Certain Mitigation." In its decision, the trial court purported to apply the test required by *Strickland v. Washington*, 466 U.S. 668 (1984), but examination of the decision readily demonstrates that the trial court unreasonably applied *Strickland*, and its decision was contrary to *Strickland* in several major respects. Among the several defects in the decision, the trial court made objectively unreasonable findings concerning the reasonableness of trial counsel's wholesale failure to investigate and present reasonably available mitigation, and it failed to apply the reasonable probability test for measuring prejudice, or weigh the totality of the mitigating evidence, as required by *Strickland*.

Following the post-conviction decision of the trial court, Lopez filed a petition for review with the Arizona Supreme Court. In his petition for review, citing, *Strickland*, Lopez asserted that his trial counsel had abandoned him during the mitigation phase of the sentencing proceedings. (ER 460-461.) Lopez described his counsel's abandonment of him during sentencing, stating counsel had "turned over the mitigation preparation" to an inexperienced junior lawyer in the law firm who lacked any relevant experience. Lopez further argued, as he has in these proceedings, that his lawyer

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[2]Throughout the prosecution, the state never attempted to elicit proof, or even argue that Lopez intended to kill his son. Instead, at trial, the prosecutor argued to the jury that she did not need to prove Lopez intended to kill the child to obtain a felony murder conviction. (ER 83.) And during oral argument on direct appeal to the Arizona Supreme Court, the state conceded Lopez may well have acted without an intent to kill, and that lack of intent to kill would be a significant mitigating circumstance. The evidence showed Lopez loved his son, had employed CPR on Anthony to try and save his life, and then wept and grieved when he learned his son had died. (ER 11; 26; 37-38; 46, 342-343) And see *State v. Lopez, supra*, at 174 Ariz.145-146, 847 P.2d 1092-1093.

failed to prepare his mental health expert to present mitigation: "[he] gave no direction to Dr. Morris as to the evaluation" and never "asked for anything specific to help the case . . . [he] believed the death penalty would not be imposed and prepared accordingly," abandoning Lopez during the sentencing phase. (ER 464.) The Arizona Supreme Court issued a postcard denial of the Lopez petition.

At the conclusion of the state post-conviction proceedings, Lopez filed the subject habeas proceedings in the federal district court of Arizona. In his habeas petition, Lopez claimed that his trial counsel had rendered ineffective assistance by failing to investigate and present all relevant mitigating evidence at sentencing, including evidence bearing on Lopez' social history and background. Lopez offered evidence to the district court (just as he had in the state court post-conviction proceedings) that the sentencing judge was deprived of information that Lopez grew up in a dysfunctional household with alcoholic parents, that Lopez began drinking as a child at an early age, and that defense counsel failed to provide the examining psychologist any facts about Lopez' family or social history. This was the same evidence presented in the state court proceedings. But the district dismissed the ineffective counsel claim, erroneously concluding it had not been exhausted, and thus the claim was not reviewed on its merits in the district court proceedings.

Following the district court's decision denying Lopez' claims, that court entered a *sua sponte* ruling (without affording Lopez an opportunity to be heard) refusing to certify the appealability of all but one of Lopez' claims. Therefore, neither Lopez' substantive claim, that his counsel failed to investigate and present reasonably available mitigation, nor the underlying district court dismissal of the claim for lack of exhaustion, were certified for the appeal. Reliant on *Slack v. McDaniel*, 529 U.S. 473 (2000), Lopez asked the court of appeals for a certificate of appealability (COA) on the ineffective assistance of counsel claim and the claim's underlying procedural dismissal.

Applying *Slack*, the court of appeals granted the COA. (See *Lopez v. Schriro*, in Petitioner's Appendix B at B-21 through B-25). The court of appeals then concluded that Lopez had exhausted this ineffective sentencing counsel claim during the Arizona post-conviction proceedings, and after determining the facial validity of the claim, it remanded the case to the district court, where the substance of the federal claim could be considered on its merits. *Id.*

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The Petition for Writ of Certiorari should be denied because this case does not implicate the questions presented and therefore cannot resolve those questions. The first question posed in the Petition presents as a fact, that the court of appeals determined that "Lopez had properly exhausted all of his ineffective assistance of counsel claims." The court of appeals' decision is premised on a much more narrow holding, not the one posed by Petitioner. The court of appeals decided only that Lopez exhausted the claim that his counsel rendered ineffective assistance by failing to present available relevant mitigating information at sentencing. (Petitioner's Appendix B at B-21 through B-25.) This is the identical claim Lopez presented in the state court proceedings; upon which the Arizona trial court issued a substantive, merits-based decision under the subject heading entitled: Claim That Mr. Bruner Failed to Investigate and Present Certain Mitigation. Contrary to the facts set forth in the Petitioner's presented question, the court of appeals never held that Lopez had properly exhausted all of his ineffective assistance of counsel claims. This case is not a proper vehicle to review a holding never entered by the court of appeals.

Second, the Petition is also inaccurate when it argues that the court of appeals held that Lopez' exhausted federal claim should be expanded to cover areas of the ineffective assistance claim not presented in the state court proceedings. The court of appeals made no holding regarding

expansion of Lopez' claim. What the court of appeals did hold (after finding the claim exhausted and facially valid) was that any issue with respect to expansion of the record on this claim would be remanded to the district court. It stated: ". . . on remand the district court will therefore need to determine whether Lopez, who received a hearing in state court, is entitled to supplement the record . . .." (Petitioner's Appendix B at B-25, n.8.)

The decision to remand the exhausted facially valid claim to the district court for its review was entirely proper, violated no principle of law of this Court, and follows a procedure routinely applied in the federal courts of appeal. See *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000) (remanding determination of merits of federal claim to district court, after COA has been granted and district court's dismissal of claim on procedural ground has been reversed); *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998) (once court of appeals concludes that the district court erred in dismissing an application because of failure to exhaust, it should vacate and remand to the district court to address the merits of the habeas claims in the first instance); *Morris v. Horn*, 187 F.3d 333, 341 (3rd Cir. 1999) (once court of appeals concludes that district court's decision on procedural issue which led to dismissal of federal habeas corpus petition was erroneous, it should remand if the district court had not considered the merits of the constitutional claims).

The second question presented in the Petition is not supported by the facts and record either. It posits that the court of appeals improperly rejected a district court decision that Lopez did not establish his ineffective assistance claim under *Strickland*. This question mischaracterizes both the holding in the court of appeals, as well as the decisions made in the district court proceedings. The court of appeals decision did not reject a district court finding, that Lopez failed to establish his federal claim under *Strickland*. (Petitioner's Appendix B at B-21 through B-24.) Instead, the court

of appeals correctly determined that the district court had not considered the merits of this federal claim, and the claim was remanded to the district court for its first consideration. While the district court did reject other wholly unrelated ineffective assistance of counsel claims, it did not decide the merits of the subject claim because it had dismissed it for lack of exhaustion.

The Petition is inaccurate in one more way as to the second presented question. In apparent support of its improperly posed second question, the Petition cites to a wholly inapposite district court decision, where that court dismissed an *Atkins v. Virginia*, 536 U.S. 304 (2002) claim, that Lopez presented in a motion to amend his habeas petition. (See Petition for Certiorari at pp. 14-15.) The district court's decision refusing to allow Lopez to add the *Atkins* claim was not the subject of Lopez' briefs on appeal, or the court of appeals' decision, and it has no bearing on the ineffective assistance claim here, or its related exhaustion issue. The district court's ruling on this wholly unrelated claim is not relevant to any of the presented questions.

THE COURT OF APPEALS' RULING WAS CORRECT

As outlined above, within the state court post-conviction proceedings, Lopez presented the claim that his trial counsel had failed to investigate and present available mitigating evidence at sentencing. The record demonstrates that counsel failed to conduct a thorough investigation of Lopez' background, that he virtually abandoned Lopez during the mitigation phase of the proceedings, and that reasonably available mitigating evidence was never presented to the sentencer. The state court helped Lopez present the subject claim by providing him with funds for an expert witness and by conducting evidentiary hearings concerning the claim. Following hearings, the state court decided this claim under the heading: "Claim That Mr. Bruner Failed to Investigate and Present Certain Mitigation." Lopez then exhausted his claim to the Arizona Supreme Court in a

petition for review, where he identified *Strickland* as the controlling federal authority, and he alerted that court, that his constitutional rights to the effective assistance of counsel in presenting mitigation at sentencing were violated when his lawyer did nothing to investigate and present mitigating evidence. The record shows Lopez plainly provided "the State the opportunity to pass upon and correct alleged violations of [his] federal rights" and he fairly presented the claim. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Petitioner has failed to cite to a decision of this Court which dictates a result different than reached by the court of appeals.

Thus, the court of appeals' decision threatens none of this Court's longstanding exhaustion jurisprudence, and each of the decisions cited by the Petitioner are inapposite. The Petitioner's citation to *Picard v. Connor*, 404 U.S. 270 (1971) is not helpful. There, the court held that an equal protection claim had not been exhausted, because it had not been presented in the state court proceedings, and the defendant's due process arguments in the state court proceedings were not sufficient to exhaust an equal protection claim. Here, Lopez did present his federal claim in the state court proceedings and the state court decided that claim squarely on its merits. Petitioner also relies on *Gray v. Netherland*, 518 U.S. 152 (1996) where this Court was presented with a federal claim premised on facts which had never been presented in any state court. Here, Lopez presented facts in the state proceedings that mirror the facts presented in the federal proceedings, and the state court addressed the merits of the claim it its final decision.

The Petition also relies on *O'Sullivan v. Boerckel*, 526 U.S. 838 (1996), where the court determined a federal claim had not been exhausted because the defendant had failed to file an application for discretionary review with the state's appellate court. Here, Lopez expressly requested the Arizona Supreme Court review his federal claim. Finally, Petitioner cites *Baldwin v. Reese*, 541

U.S. 27 (2004), where the court found that a federal claim had not been exhausted in its presentation to the Oregon Supreme Court, by its inclusion in a lower court opinion. Again here, unlike *Baldwin*, Lopez did include his federal claim within his Arizona Supreme Court petition.

The court of appeals' exhaustion ruling is not contrary to any of the cases cited in the Petition for Certiorari, or this Court's jurisprudence. The court of appeals decision is reasonably considered, it is supported by the undisputed facts in the record, and was correctly decided.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *STRICKLAND*

The Petitioner argues alternatively, that if Lopez' federal claim has been exhausted, then the exhausted claim should be dismissed because the court of appeals failed to defer to a reasoned state court decision. This argument should be rejected for several reasons. First, the argument was not presented below, and under this Court's rules it is not properly raised now for the first time. U.S. Ct. R. 14 (requiring a petitioner to show that a federal question was timely and properly raised in the proceedings below); *Rita v. United States*, 127 S.Ct. 2456, 2470 (2007) (declining to consider an issue not raised below); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (finding an issue waived when not raised below).

Not only did the Petitioner fail to raise the issue below, but even now in its Petition for Writ of Certiorari, the Petitioner provides no factual or legal support for its argument that the state court made a reasoned decision to which the Lopez claim must defer; it simply states this, inadequately, as a bald-faced conclusion.

Just as important, in addition to not being raised by the Petitioner below, the issue was not decided by the court of appeals. The court of appeals did not undertake to determine the merits of

the federal claim. The court of appeals only determined that Lopez had "sufficiently alleged the deprivation of a constitutional right," and then it remanded to the district court the task of deciding the merits of the claim. (Petitioner's Appendix B-24.) This Court's intervention, to decide the merits of a claim that has yet to be fully presented or decided by any lower federal court is not warranted.

What is more, although the Petitioner failed to raise any issue or argument with respect to the merits of the claim below, Lopez did present substantial evidence and law to the court of appeals, which demonstrated that under 28 U.S.C. § 2254(d), the last reasoned decision of the state court was contrary to and unreasonably applied *Strickland* in several key respects.[3] All that the court of appeals decided based on Lopez' § 2254(d) showing was that he had made a sufficient demonstration to warrant an initial determination of the claim on its merits. Under these circumstances, the courts of appeal have uniformly agreed that remand to the district court is proper. *Jefferson v. Welborn*, *supra*, 222 F.3d at 289; *Whitehead v. Johnson*, *supra*, at 157 F.3d 388, *Morris v. Horn*, *supra*, at 187 F.3d 341. The remand to the district court was especially proper here, given the fact that Petitioner had elected not to argue the merits of the claim in its briefing to the court of appeals.

THE REMAND TO THE DISTRICT COURT WILL NOT RESULT IN THE PRESENTATION OF EVIDENCE THAT WILL FUNDAMENTALLY ALTER THE CLAIM

Finally, Petitioner argues that Lopez' claim hinges on new information that was not presented in the state court. (Petition at 13.) Petitioner also expresses some vexation over a footnote in the

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[3]When considering potential state court error, this Court looks to the "last reasoned decision of the state court as the basis of the state court's judgment." *Ylst v. Nunnemaker*, 501U.S. 797, 803-804 (1991). Here, the last reasoned decision was made by the trial court.

court of appeals' opinion deferring to the district court any decision concerning whether Lopez will be permitted to supplement the state court record. As an initial matter, these arguments were not raised below, they are not fairly included within the questions before this Court, and they are not appropriately raised here for the first time. However, beyond this, the argument is without merit. Remand will not result in presentation of evidence that will fundamentally alter the claim.

As explained above, the primary facts supporting Lopez' claim are already contained in the state court record, and those facts will be relied upon when the case is finally remanded for the further district court proceedings. (See pp. 1-5 above.) Upon remand, the district court will decide in it's discretion whether Lopez may supplement the record. *See Vasquez v. Hillery*, 474 U.S. 254 (1985).

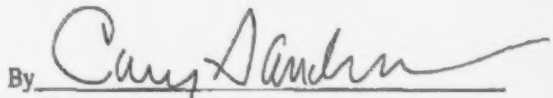
The court of appeals footnote concerning the possibility of Lopez presenting supplemental evidence addresses a statement made in Lopez' opening brief in the court of appeals, where he candidly disclosed that "Lopez' presentation in the federal [district] court expanded somewhat on the level of dysfunction and poverty in the household, but the evidence presented in the federal proceedings did not significantly alter, or have the effect of not exhausting the claims." (Lopez' Opening Brief at p. 67.) The court of appeals properly determined not to decide the admissibility of the additional evidence, remanding the question to the district court, where the merits of the claim will be determined in the first instance. The court of appeals correctly decided that the district court should serve as the appropriate gatekeeper of evidence Lopez offers to support the merits of the claim.

CONCLUSION

The court of appeals correctly decided the exhaustion issue on a unique set of facts and properly remanded Lopez' ineffective assistance of counsel claim to the district court for its determination on the merits. The Court should deny Petitioner's request for a Writ of Certiorari.

Dated this 24th day of December, 2008.

WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.

By 
*Cary Sandman
Attorneys for Respondent

Kevin Clarence Lerch
LAW OFFICE OF KEVIN LERCH
3661 N. Campbell, #118
Tucson, AZ 85719

*Counsel of Record